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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~348~~ 139

JAMES HORNBUCKLE AND SAMUEL MARSHALL, PLAINTIFFS IN ERROR,

vs.

JOHN TOOMBS.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED FEBRUARY 21, 1872.

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1 In 3rd judicial district court Lewis & Clarke County, Montana Territory.

JOHN TOOMBS
vs.
JAMES HORNBUCKLE AND SAMUEL MARSHALL.

Be it remembered that, on the 13th day of April, 1870, that being one of the days of the March term of this court, this cause came on to be tried before the court and a jury upon the issues therein made and which are as follows:

Amended complaint.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

In the district court 3rd judicial district in and for the county of Meagher and Territory of Montana.

JOHN TOOMBS, PL'FF,
vs.
JAMES HORNBUCKLE, SAMUEL MARSHALL, John Doe, & Richard Roe, def'ts.

2 Now comes the plaintiff in the above-entitled cause, by Woolfolk & Toole, his attorneys, and for amended complaint filed, by leave of the court first had and obtained, complains of the defendants herein, and for cause thereof shows unto the honorable court that heretofore, to wit, on the first day of May, A. D. 1869, and for a long time prior thereto, this plaintiff was, and now is, the lawful owner of, and in the quiet and peaceable possession and enjoyment of, a certain ranche or tract of land in the county of Meagher and Territory of Montana, commencing at the mouth of a certain creek or gulch known as Magpie, on the east side of the Missouri River, and thence along the bank of said river one-half mile; thence easterly one-half mile; thence southerly one-half mile; thence westerly to the place of beginning, so as to embrace one hundred and sixty acres. That said ranche or tract of land
3 was taken up and used and possessed by the plaintiff and his predecessors in interest for the purpose of farming and raising and producing crops thereon; that said ranche or farm is on the banks or in the neighborhod of said Magpie Creek; that said ranche or tract of land was taken up and used and possessed by this plaintiff and his predecessors in interest for the purpose of farming and raising or producing crops thereon; that, in order to successfully farm said ranche or tract of land and raise and produce crops thereon, it is requisite and necessary to irrigate the same during the cropping season, to wit, the months of May, June, July, and August of each year; that said plaintiff and his predecessors in interest, for the purposes of farming the said ranche as aforesaid, appropriated and took up about two hundred and fifty inches of the waters of said Magpie Creek, and by means of certain water-ditches of the capacity to carry said water conducted and conveyed the same in and upon the said ranche or tract of land of
4 plaintiff; that said appropriation was made some time in the month of June, A. D. 1865; that this plaintiff and his predecessors in interest have ever since been entitled to use and enjoy the waters afore-

said in the said ditch, and this pl'ff, at the time of the commission of the greivances hereafter mentioned was, and now is, entitled to have, use, and enjoy the water aforesaid for the purposes hereinbefore mentioned, without let or hindrance from the said defendants or any other person or persons whomsover; that, by means of the use of said water as aforesaid, this pl'ff was enabled to raise and produce valuable crops of various descriptions upon his said ranche or tract of land and realize large sums of money for the same; that, without the use of said water so appropriated by plaintiff, the said ranche is wholly valueless, and the plaintiff would be wholly unable to produce crops thereon.

5 Plaintiff further states that, notwithstanding the rights of plaintiff in the premises and his prior appropriation of the waters of said creek and his rights to the use and enjoyment of the same as aforesaid, said defendants, on the first day of May, A. D. 1869, and continuously thereafter wrongfully and unlawfully diverted said water from the ditches of plaintiff, and deprived the plaintiff of the use thereof, whereby large and valuable crops of plaintiff were almost wholly ruined and destroyed.

That this plaintiff has sustained damages by reason thereof in the sum of three thousand dollars.

Plaintiff further states that, the said defendants threaten to continue to divert said water as aforesaid, to the great damage and injury of the plaintiff.

Wherefore plaintiff prays judgment against the said defendants for the sum of three thousand dollars damages and costs of this action; and that, on final hearing of this cause, the said plaintiff be de-

6 creed the title to as much of said waters as aforesaid as he has appropriated for the purposes aforesaid; and that the defendants, thier agents, servants, and employees, and all persons acting by, through, or under them, be forever restrained and enjoined from diverting the said waters so as to prevent the same from flowing through the ditches of plaintiff and upon his said premises, and for such other and further relief as to the honorabe court may seem just and proper.

WOOLFOLK & TOOLE,
Att'ys for Pl'ff.

John Toombs, being first duly sworn, states that he is the pl'ff in the above cause; that he has heard the foregoing complaint read and knows the contents thereof, and that he has good reason to believe and does believe that the matters therein stated are true.

JOHN TOOMBS.

Subscribed & sworn to before me this 25th day of Nov., 1869.
T. J. DAWES, *Clerk.*

7 *Answer.*

In district court, third judicial district, county of Meagher, Territory of Montana.

JOHN TOOMBS
vs.
JAMES HORNBUCKLE ET AL.

And now come the above-named defendants, by thier attorneys, Chumasero & Chadwick, and, for answer to the complaint of the above-named plaintiff, herein deny—

That the said plaintiff, for the purposes of farming the ranche men-

tioned & described in said complaint, ever at any time took up or appropriated about two hundred & fifty inches of the water of Magpie Creek named in said complaint, or any quantity of water whatever from said creek, or that, by means of any water-ditch, conducted or conveyed the water aforesaid in and upon the said ranche of the said plaintiff.

8 Deny that the said plaintiff was posses'ed of any water-ditch of the capacity mentioned in the said complaint.

Deny that the said plaintiff or his predecessors in interest ever made any appropriation of the water in said complaint described in the month of June, A. D. 1865.

Deny that the said plaintiff, or his predecessors in interest, or any of them, ever have been entitled to use & enjoy the water aforesaid in their said ditch, or that the said plaintiff, at the time of the commission of the supposed wrongs & injuries mentioned, & set forth in said complaint, was, or that he now is, entitled to have and enjoy the water, mentioned & described in said complaint, for the purpose therein mentioned in any manner whatever.

Deny that, by means of the use of the said water, the said plaintiff was enabled to raise & produce valuable crops of various descriptions upon his said ranche or tract of land, or realize large sums of money for the same.

9 Deny that, on the first day of May, A. D. 1869, or on any other day, or at any other time, said defendants wrongfully or unlawfully diverted said water from any ditch belonging to the said plaintiff, or deprived the plaintiff of the use thereof, or that they have ever, at any time, so wrongfully or unlawfully diverted the said water from the said plaintiff's ditch, or deprived him of the use thereof.

Deny that the said plaintiff, by reason of any act of these defendants, has been damaged in the sum of three thousand dollars, or in any sum whatever.

And the said defendants, for further answer to the said complaint, aver that, upon the 15th day of May, A. D. 1866, the waters of the said Magpie Gulch, situate in the said county of Meagher, were 'appropriated & unclaimed; and that these defendants, finding the same so unappropriated & unclaimed, took possession of the same on the day & year last aforesaid, and conveyed the same upon the foot-hills about

10 the said gulch, & there used all of the said water of said gulch for mining purposes.

That these defendants remained in the quiet & peaceable use & enjoyment of the said water as aforesaid until about the month of October, A. D. 1866, when these defendants commenced the survey of a ditch leading from the said Magpie Gulch to Cave Gulch, and, early in the spring of 1867, completed such ditch at great expense, to wit, the sum of twenty-two thousand dollars, and from that time until the present day have been in the quiet & peaceable use & enjoyment of the said water, & been conveying the same to the said Cave Gulch, where the same is used for mining purposes.

That the said plaintiff & his predecessors in interest had full knowledge of the construction of thier ditch, & the use & enjoyment of the said water by these defendants, but stood by & saw the appropriation made by these defendants, & the construction of said ditch, & made no claim to the said water, or, in any manner, asserted title thereto.

11 Wherefore the said defendants pray judgment against the said plaintiff for costs of suit.

CHUMASERO & CHADWICK,
Def'ts' Att'ys.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

James Hornbuckle, being first duly sworn, deposes & says that he is one of the defendants named in the above-entitled action; that he has heard the said answer read, & knows the contents thereof; that the same is true, of his own knowledge, except as to those matters therein stated upon information & belief, & as to those matters he believes them to be true, and has reason so to believe.

JAMES HORNBUCKLE.

Subscribed & sworn to before me this 3rd day of Aug., 1869.
W. F. CHADWICK,
Notary Public.

Amendment to answer is in the words & figures following, to wit:

12 In 3rd judicial district court, Lewis & Clarke County, Montana Territory.

TOOMBS
vs.
HORNBUCKLE ET AL.

Insert after word "thereto," on last line of 4th page of answer as follows:

The defendants in this cause, for amendment to their answer, by leave of the court first had and obtained for that purpose, states and aver that, prior to the time and while the said defendants were contemplating the construction of the defendants' ditch in thier answer mentioned, the said plaintiff, by his acts and declarations, encouraged the construction thereof, and said defendants were thereby encouraged to go on and construct said ditch; and, upon the faith thereof, they did go on and construct thier said ditch, and expended large sums of money in and about such construction of such ditch.

CHUMASERO & CHADWICK,
Def'ts' Att'ys.

13 TERRITORY OF MONTANA,
Lewis & Clarke County:

J. Hornbuckle, being duly sworn, says he has heard the foregoing amendment to the answer read, and that he has reason to believe, and does believe that the matters as therein set forth are true.

JAMES HORNBUCKLE.

Subscribed & sworn before me this 13th day of April, 1870.
CHA'S W. FOWLER, *Clerk.*

Replication.

JOHN TOOMBS, PL'FF,
vs.
JAMES HORNBUCKLE ET AL., DEF'TS.

In the territorial district court, 3rd judicial district, Meagher County, Montana Territory.

Now comes the plaintiff, by his attorneys, Woolfolk & Toole, and for replication to the answer of defendants, deny that, upon the 15th

14 day of May, 1866, the waters of said Magpie Gulch were unappropriated or unclaimed.

Deny that said defendants on the date aforesaid found said waters unclaimed or unappropriated or took possession of the same or conveyed the same about the foot-hills of said gulch, or there used all the waters of said gulch for mining purposes.

Deny that defendants remained in the quiet and peaceable possession or enjoyment of the said water until about the month of October, 1866.

Deny that, in October, 1866, the defendants commenced the survey of a ditch from Magpie Gulch to Cave Gulch or completed said ditch in the spring of 1867.

Deny that said ditch cost the sum of twenty-two thousand dollars.

Deny that, since said date, the defendants have been in the quiet & peaceable use or enjoyment of the said water, or have conveyed
15 the same to Cave Gulch as alleged in defendant's answer.

Deny that this plaintiff or his predecessors in interest had full knowledge, or any knowledge whatever of the construction of said ditch, or the use or enjoyment of the said water by defendants.

The plaintiff then introduced the following evidence.

JOHN TOOMBS (plaintiff) testified as follows:

Went to Magpie in summer of 1865; think May or June. True consideration is expressed in the deed; purhased from Richards and Sewell. All parties signed bill of sale at same time. I was present. (Here the bill of sale was introduced. To the insufficiency of which the def'ts excepted, which was overruled by the court, and the bill of sale of March 7th, 1866, was admitted in evidence.)

I am the John Toombs mentioned in the bill of sale, and in the proof of execution. I took possession right away after bill of sale
16 was executed. There was a ditch diverting the waters of Magpie Gulch at the time. About 150 inches of water in said ditch. The ditch about ½ mile long; ran to plowed ground; was finished when I went there; commenced fencing in 1866; have never abandoned ditch. I afterwards started another ditch; commenced work on it in Sept., 1866; ran a "dead level" in June; took out about 200 inches of water; finished last ditch in May, 1867. Hornbuckle & Marshal turned out water above in May, 1866. water went to Cave Gulch, they left a great deal of water that year.

In July, 1869, they left 30 or 35 inches. In the spring of 1869, they left about 100 inches. About 35 inches came down to my ranch. My ditches would carry 300 inches. I had 32 acres of grain & vegetables; could irrigate about 11 acres. I cut about 4 acres of wheat—about 50 bushels. Average crop is about 30 bushels per acre; had about 9
17 acres wheat; got about 100 bushels of barley; barley was fair; will stand more drouth than other grain. Oats was nearly total loss; cut about 2 acres. Ground will yield about 40 bushels per acre; got about 30 bushels off of 9 acres. Raised about 2 acres of potatoes; frost caught potatoes; did'nt get water on turnips; gathered 2 or 3 tons of turnips; good crop would be 10 or 12 tuns, worth $25 or $30 per tun; Oats worth $1.25 per bushel; barley worth $1.50; wheat worth $2.00. Raised about 1,200 lbs. onions—half crop—worth 10 ct's per lb.; have 90 acres in hay land—fair crop is 1 tun per acre. Raised last year about 15 tuns; hay worth $15 per tun. In 1866, the river was up, & I cut about 125 tons; had about 1½ acres cabbage. Hornbuckle turned out in upper ditch, about 180 inches; first ditch was constructed in 1865.

The water from the first ditch of Hornbuckle, constructed in 1865, all flowed down to my ranche, after he had done using it. This
18 ditch was upon the same side of the creek as my ranche—but when the defendants turned out the waters of Magpie into the second or upper ditch, and carried them to Cave Gulch, my ranch lost the entire benefit of the water. This ditch was on the other side of Magpie from my ranch and above it. Last year, during the cropping season, this ditch took all the water out of Magpie, at its head, and left none flowing down the creek. The result was that I had but very little water during the cropping season, and my crop was almost entirely destroyed. I did not have, exceeding forty or fifty inches of water for two hours every day.

Cross-examination:

Our ditch had been taken out of Magpie when I purchased. Stafford ditch crosses the other; don't remember the log pen refer'ed to;
19 put up line fence in 1866; old ditch ran below the road. Ditch was two furrows of plow; bank about 16 inches high; ditch about 10 inches deep. There was about 100 inches of water running in ditch below the road. In 1866 there was about $\frac{2}{3}$ of ditch left complete, the other was plowed up; didn't need water from ditch in 1866; didn't measure water; guess at number of inches; water crossed the road without a bridge. Stafford used my ditch in 1867 & I used his; dug 2nd ditch in 1866 about $\frac{3}{4}$ of mile; turned water from Magpie into ditch in spring of 1867; changed grade of ditch in spring of 1867. There was brush in gulch where water was taken out; grade of ditch $3\frac{1}{2}$ inches to rod; size of 2nd ditch 30 inches at top; 20 inches on bottom; 16 inches deep; has never been enlarged. I used no water in 1866 that the defendants were using; was not at head of Hornbuckle ditch in 1866; was not there in 1867; was not up in the hills in 1867;
20 was at Cave Gulch in 1867; saw ditch there in the fall of 1867; didn't state that I was glad def'ts were going to take water out.

Q. State whether or not on or about the 14th day of April, 1867; at your ranche in Meagher County you stated to Mr. Marshall one of the def'ts, that you were glad that they were going to work to bring in the ditch, as it would be a benefit to the whole community, or words to that effect?

I don't remember having said anything of that kind; don't think I made any such statement. The miners were using water above me (between me & Hornbuckle's ditch on the bar; took water out below Hornbuckle's ditch. Water was taken out by miners on both sides of gulch. The capacity of def'ts ditch is about 180 inches; don't know am't of water taken out by def'ts last year. The river drowned wheat out in 1866; sowed some—didn't raise any. I bought out parties who said they owned ditch; didn't buy in with Stafford. Hendricks
21 & I were farming on the shares last year. Hendricks was to get what was customary. I furnished the seed. Hendricks furnished labor. Hendricks was to have $\frac{1}{3}$ crop & suffer $\frac{1}{3}$ loss. This agreement was made since trial at Diamond City. I didn't use all water that run down last summer. Stafford used it part of the time. Stafford used my ditch every other week. My ditch would carry about 200 inches; would carry all water from miner's reservoir.

Direct resumed:

Hendricks had no interest in ditch; no interest in this suit; no interest in damages. Wagon-road 3 or 4 hundred yards above ditch

stopped work in Dec., 1866, & commenced work in spring, 1867, April; completed ditch in May; water turned in ditch in Sep. or Oct., 1866—Oct. Ditch, in 1869, ran about 3½ hours per day. Stafford located ditch in spring of 1866.

HENDRICK:

22 First knew Toombs' ranche in 1866; lower ditch was there in 1866; have been at ranche since that time; grade 1½ inches to rod. I commenced work about middle of Oct. 1866, on the upper ditch of Toombs. Toombs had been to work 2 or 3 weeks before; old ditch of def'ts constructed in 1866. Toombs got benefit of water used in hydraulic on his meadow. Toombs ditch surveyed in June, 1866. Toombs had 8 acres wheat; poor crop; fair crop of wheat 18 to 22 bushels per acre; raised about 8 to 10 bushels per acre last year. There might have been 50 inches of water running from 3½ to 4 hours per day; had 6 acres of barley. About 22 bushels would be a decent crop. We raised about 100 bushels barley, 5 or 6 acres potatoes, 3 acres turnips. 30 tuns of hay was raised last year, worth, last fall, about $15 to $20 per ton. When the defendants constructed their upper ditch it took all the water flowing in Magpie that run through their ditch to Cave Gulch. During the dry
23 season last year the plaintiffs did not have over forty or fifty inches for two hours a day and his crops was almost entirely ruined in consequence of it. This scarcity of water was caused by the upper ditch of defendants turning out all the waters of the Magpie and carrying it to Cave Gulch. The upper or Cave Gulch ditch of Hornbuckle was not commenced until the spring of 1867, and the upper ditch of Toombs was commenced some time in September, 1866, and the lower ditch of Toombs had been built long before this. I saw the lower ditch myself some time in the spring of 1866.

Cross-ex.:

Had ⅓ crop last year. I look to Toombs for loss by scarcity of water. Mo. River did not overflow meadow last year. Ditch was used in 1867 part of way; used about 20 inches, in 1867, from upper ditch; lower ditch used until flood. I surveyed upper ditch with triangle. Toombs moved on ranche, in July, 1866. Potatoes froze'; ditch filled up
24 by tailings. Miners used water on each side of gulch. We got water after miners used it.

Re-direct:

I went on ranche in March, 1867, for Toombs. Toombs was there once or twice before June. Lower ditch was used for hay grounds.

Captain STAFFORD:

Reside at Cañon ferry. The map is about correct. The lower ditch I helped to construct in June or July, 1865; ditch runs down through my field; ditch about 16 inches deep 2 feet wide. Measured ditch yesterday; turned out about 75 or 80 inches; has not been changed. Ditch 3 inches to rod grade. Upper ditch of Toombs constructed about Sept. or Oct., 1866; 85 or 100 rods dug at time. I saw Toombs in Oct. Ditch has not been changed; capacity about 300 inches, if built as was calculated; don't know dimensions of ditch; measured ditch at head about 3 rods from dam; grade 6 f't 2 inches to 110 paces. Upper ditch
25 completed in spring of 1867. Hornbuckle commenced on ditch to Cave, in May, 1867; got water in July or August, 1867. They

(Keeler ditch) had ditch below—1½ or 2 miles below upper ditch—about 2 miles from Hornbuckle to Toombs' ditch. There were no mines known at date of construction of lower Toombs' ditch. Water from Hornbuckle ditch came down to Toomb s place. Cave Gulch ditch does not return water to Toombs' place. Made a field on Magpie in 1866 & made ditch to irrigate. I am a ranchman & ferryman; have lived at my place on Mo. River since 1865. There were about 30 or 35 inches of water below the ditches of Hornbuckle. Toombs & I divided the water, week about. Toombs' didn't have enough water last year for his crop. I cut 15 tons off of Toombs' place last year. Another party cut about 5 tons. The ordinary crop would be about 50 tons on field that the upper ditch would irrigate. In 1866 they raised about 100 tons; in 1867 about
26 75 tons. We measured Toombs' ditch & Hornbuckle's ditch yesterday. Hornbuckle's flume is 32 x 15 in clear—ditch where it comes out of creek can't measure—about 2 f't × 4 feet; grade of Hornbuckle ditch ¼ inch to rod. Griffith was with me—about 50 inches now running over Hornbuckle's dam. Toombs' upper ditch capacity don't know; am not judge of miner's measure. The Cave Gulch ditch of Hornbuckle took out all the water at the head of ditch last summer, and Toombs' consequently did not have over forty or fifty inches of water for an hour or two each day. His crop was very much injured in consequence thereof.

Cross-ex.:

Didn't state at Diamond City that lower ditch would only carry 25 inches. Used water in 1865 2 or 3 times; plowed it up next year (1866.) Lower ditch was not used in 1866, 1867, or 1868. Water turned in
27 upper ditch in spring of 1867. There were about 40 inches flowing constantly below springs in 1869. Miners used water on both sides of gulch. I stopped miners in June; wouldn't had enough to irrigate ranches if we had got all the water. After crops would have been irrigated, there would have been none left for meadow. Hornbuckle used in June or July, in 1869, about 30 inches; 80 inches would not near irrigate all the crops. Have seen 1,000 or 1,500 inches flowing in Magpie. Ordinarily there were not over 100 inches in dry weather. In ordinary season when snow is going off, a large amount of water would pass Hornbuckle's dam. The water sinks in gulch between Hornbuckle & springs. I have a ditch below Hornbuckle's. If Toombs gains suit, I will have more water to use. Measured part of old ditch that was dug with shovel & pick. Used lower ditch last in 1868.

Re-direct:

Have no interest in Toombs' ditch. Toombs is responsible for
28 costs; am on his bond for costs. There is about 100 inches now flowing in Magpie; there were about 100 inches flowing last year—not enough to fill Toombs' ditch. There were about 50 inches flowing from springs last year constantly.

GALA:

Resided in this town in 1869. I owned interest in ditch from Magpie to Cave. Work commenced in April, 1867. Had seen ditches below at that time.

Cross-ex.:

Lived from Jan'y, 1867, until Nov., 1868; was not there in fall of 1866. Keeler told me that upper ditch of Hornbuckle had been surveyed in 66; saw pegs. There was frost in ground when we ran line off; got my interest from Keeler; didn't see ditch that would carry 200 inches.

Re-direct:

29 Didn't notice capacity of ditches below; capacity of Cave Gulch ditch intended to carry 250 inches; would carry about 200 inches. This ditch was finished in July, 1867. In the spring of 1867 there were 300 inches in Magpie. In July, 1867, there were about 200 inches.

X:

Don't think ditch would carry 200; turned all water in afterwards.

Re-direct:

(Obj. sustained.)

ROBINSON:

Reside at Ruby City, M. T.; miner; water in lower ditch in 1865; portion of upper ditch constructed in 1866, Oct., Nov.; saw it; capacity about same as now. Mitchell & Keeler ditch commenced in May, 1866. The lower ditches were constructed when I located the M. & K. ditch. Lower ditch (Stafford & Toombs) would carry about 50 inches. Have dug a good many ditches of same size.

X:

Have been a miner for 15 years. Estimate lower ditches 40 or 50 inches. Commenced construction of Keeler ditch short time after location. (Location May 15, 1865.)

30 DANIEL GRIFFITH:

Surveyor; Have surveyed Toombs' ditch. It is pretty well filled up. It has 2½ in. fall to rod; surveyed them yesterday—ditch 30—20—18; would carry 2 times 9—182 without repair. It would carry, if cleaned out, 273 inches part of way—52 inches at head at Hornbuckle's ditch. Hornbuckle ditch grade ¼ in. to rod—would carry 300 inches.

X:

Didn't see lower ditch; over 20 rods was plowed up; tailings in it; tested fall of ditch at head; water runs rapidly at 3½ inch grade; will wear ground & increase size; don't know what upper Hornbuckle ditch would carry through. Water rises in gulch from springs above the Toombs ditch. Stafford was with me.

Re-direct:

Difference between ¼ & 3½ in. grade would be over twice as much.

A. T. LAIRD:

31 "49-er." A ditch 2 feet wide & had a grade 2 in. to rod, & put board on either side & bottom without aperture; construct a slide to pull upon down or sideways; water has to back 6 rods before it will come to level; heard Griffith's explanation of water measurement; not definite.

X:

Bottom of box for measurement of water ought to be level. Griffith measured on 3½ in. grade—would carry more water.

W'M MCCRACKEN:

Was at Cañon ferry last summer; know Toombs' ditches; was carrying on Stafford's farm; when reservoirs open, there was from 100 to 150 inches running down 4 or 5 hours per day; was not there during

drouth. I was there in May & June; was not around in July; rush of water overflow d[illegible]h.

X:

I was interested in crop on Stafford's ranch. Ditch was full at
32 times. There were miners at work above—Culbertson & others.

Q. You have stated in your direct examination that the water was reservoired above the ditch of Toombs, the plaintiff. State when & by whom,

(Objected to. Objection sustained. Def'ts except.)

The water of Magpie was used above Toombs' ditch. The water was used by miners. Dry season last year.

Redirect:

The upper ditch carried all the water.

JAMES HORNBUCKLE, (one of def'ts:

Reside at Cave Gulch, about 2 miles from Magpie; first became interested in Magpie, in 1866, in a ditch located May 16, 1866. Keeler was principal in construction of ditch. We bought shortly after location; paid $500. It is about ½ mile below the upper ditch; ex-
33 tended south of Magpie about 4½ miles; capacity, 32×15; grade, ¼ in. to rod; appropriated water for mining purposes; would carry about 200 inches; commenced survey of upper ditch about Oct. 1866; Surveyed to Cave Gulch, 5 miles; April, 1867, soon as frost was out, commenced work on upper ditch; completed it in August; worked on it continuously; cost, about $22,000; capacity, 32×15; lighter grade; don't think there *were* 10 inches difference between the Keeler & Cave ditches; at head of Magpie, in 1866, we turned all the water into ditch. In 1867, there may have been a little water run over the dam. Freshet occurs in June & lasts about a month. In 1868, water light; dry season. In 1869, no water, scarcely—just enough to keep flumes wet. Didn't sell any water, except, water represented one hand in mines & we got share of profits. In July, 1869, only about 25 inches: ditch nearly a mile above springs; were mining on side
34 of gulch last year. They run a hydraulic from springs, 75 or 80 inches. Sold deserted cabin, in 1866, at Toombs', place. Never noticed lower ditch until last fall—November—about 2 or 3 rods at upper end of lower ditch, that would carry about 20 inches—grass growing in some places—plowed up. Couldn't trace ditch to turnip patch. There were 4 or 5 rods of unbroken sod, not broken by pick, plough, or anything else. In '66, water & musquitoes took the county. 1st saw upper Toombs ditch in 1867. Grade, some places, 6 inches or foot to rod. Will average 4 inches to rod. From heavy grade to Toombs' ranch, carry about 40 inches; when I first saw it it would carry 25 inches. Dimensions of upper ditch of Toombs, about 10 in. on bottom & 12 in. on top—6 inches deep. Cave ditch surveyed in 1866. Toombs was along construction of ditch; had to pass over or under it go-
ing to Cave. The object was to take all the water. Toombs
35 never notified me of any claim until July 4th, 1869; never raised any objection till that time. First saw water, Aug. 8, '67, in upper ditch. Had run water 2½ years without objection. Have seen water measured, about 16 or 20 inches. The upper spring runs about 35 or 40 inches; the 2nd spring, 20 inches; the 3rd 15 inches. The springs would have overrun all the ditches Toombs had. Miners were dumping water ½ from Magpie; spread out about ½ mile over dry

ground. About ½ of water may have got back to Magpie. In June & July, 1869, the miners had a reservoir; would shut down about 16 hours & used about 8. They used about 100 inches to hydraulic. The ditch above where Stafford's takes out water has been enlarged—loose soil scraped out, &c. 75 inches *are* more than the ditch would discharge, on Toombs' ranche. Was at head of my ditch Apr. 3, 1870.

There are not more than 15 or 20 inches of water there. Griffith's
36 measurement of water is not correct.

(Here the witness explained measurement.)

It is what they call ranch-measurement. Toombs said he had to divide with Stafford. I offered to turn out water if I could do so without damaging the flumes. I have 2 or 3 miles of flume; can see Toombs' ditch 100 yards on either road. There was no trace of ditch, in fall (Oct.) 1866. Had mines there; herding & living there; lived there all winter; lived about ½ mile from head of ditch; no ditch there. If there had been any stakes there would have seen them. Small quantity of water sinks between my ditch & springs; turned out 23 inches last fall; it all sunk. Never saw head enough last summer to run down from ditch to springs.

Cross-examination:

Springs always about same and don't appear to be affected by rains.

Ranchmen suffered more in 1869, than any other season. Toombs
37 planted crop late; run water in both ditches in 1867. There were 100 inches running about the time they were cropping. Haven't used Keeler ditch since '68, in July. Haven't had water enough. There are about 120 inches flowing below springs now. About same last year. Saw water running to waste from Toombs' ditch last summer. Saw it running away last Friday.

Re-direct:

Dumped water back into Magpie used in ditches in 1868.

KEELER:

Miner; map is about correct; am familiar with location of ground in that section. Keeler ditch commenced in May, 1866. Daney, McGeary, McGuire, & one or two others. Marshall came up with Mitchell, & bought in. I sold my interest to Gale & McGinnis after completion. It

was completed in July or August, 1866; 1st survey was taken
38 about ½ way between ditches. This was in May, 1866; commenced surveying Cave ditch in Oct., 1866; ran a base line, placed stakes, & marked barck-marks on trees and blazed; ditch about 5 miles; was 3 or 4 days running line; sold out next spring about April; commenced setting grade lines before frost out of ground; went to reside at Magpie in May, 1866; lived there with family until I moved away in Oct. The lower ditch is in bad condition; only part of it there. Toombs' ditch ¼ or ½ mile from where I lived; mined about there; saw no ditch there in Oct. I had cows & stock, & had to travel about there several times a day. There is nothing to prevent me from having seen it if it had been there; know how to measure water; measured capacity of said ditch last Oct. or Nov. at point where Stafford takes out water; ditch would carry 43 inches, measured with measuring-box; some water

running over ditch near the creek. Griffith's measurement is not
39 correct. It is not the way to measure water; have never seen water measured in that way; capacity of Cave ditch about (calculated for 300 inches, but won't hold it.) It is a crooked ditch. They

ran about 23 inches last Nov., 1869. There were about 43 at Toombs ditch; below springs about 80 inches. Toombs' ditch would not carry all the water running; would lose about ⅓ running through tailings. About 60 inches flow from big springs; 1st upper one; other springs come up promiscuously. About 60 inches flowed from big spring last year; about 20 inches from the others. Toombs' ditch was carrying its capacity at that time, 43 inches; last saw Toombs' upper ditch a few days ago. The ditch is deeper than it was last fall, in Nov.

X:

The ditch was dug irregularly. I measured where it had an outlet into the field; water was muddy. I measured there because it was
40 about the average size of the ditch. (Here Griffith explained his measurement, which witness states is not correct.) Have never experimented on Griffith's system. (Here witness explained Trask's measurement in California.) A ditch, 16 inches at bottom & 2 feet at top, might produce 100 inches on a grade of 3½ inches to rod; drove pegs for Cave ditch forepart of Oct., 1866, near 1st of month. There was a party gone hunting in the mountains that I expected to get to help me. I had to get others—Mr. Marshall, Mr. Harris, Mr. . I don't know only what they told me; don't know who they all were. The survey was after they had gone, perhaps 5 or 6 days; took probably 5 or 6 days to make survey; it was freezing. I ran off ditches at Eldorado Bar before the Cave ditch; must have gone to Eldorado Bar in April; never saw any water in the lower ditches—either the lower Toombs' ditch or Stafford ditch. Hornbuckle was interested
41 when I sold out. Have seen Hornbuckle in possession of ditch.

Re-direct:

It was cold weather when we were driving grade-pegs, and it would not be expedient to go on with work at that time.

GALE:

Was original owner in ditch; have no interest now; helped survey Cave Gulch ditch; commenced work April, 1866; run water last July, 1866. I sold to Hornbuckle & Marshall, Oct. or Nov., 1868. In 1867, June & July, didn't take all the water in Magpie; took all water in 1868, except a week or two. Toombs never notified us that he claimed water. Ditch cost about $15,000 first; after expense run it over $20,000. I bought of Keeler. Both ditches same size; have had experience in water-ditches. Water would double capacity of Toombs'
42 ditch in one season running through that kind of ground, with the grade of that ditch—unusual grade.

OTTO PETERSON:

Live in Helena now; resided in Cave Gulch heretofore; was with Col. Keeler when he measured Toombs' ditch last fall. I recognise ditch on map; measured down about ⅔ from head; measured ditch, & it measured 44 inches last November; ditch was full and running over; helped turn water into ditch from Magpie. It was a good ditch when I turned it in. It filled the ditch; have had experience in ditches; have mined for 12 years. The soil is loose where the ditch runs. The water on grade of 3½ inches to the rod would cut the ditch larger; helped measure water at head of Hornbuckle's ditch; measured 23 inches; measured 73 inches, & ten inches run over, below springs.

X:

43 W*ere* at springs in 1866 & 1868; didn't notice difference in size of springs; think water about same last fall as usual; measured Toombs' ditch 25th November, 1869; no water in ditch when we went there, except an inch or two; farmers irrigate in the summer months; didn't notice tailings; think measured ditch about ½ mile from head. Mr. Marshall asked me to measure the ditch.

Re-direct:

We turned in about 50 or 55 inches in the ditch.

X:

Didn't turn in all the water in the gulch; probably left 25 inches; didn't see grass growing on walls of the ditch.

W'M H. SMITH:

Miner for 14 years; know how to measure water. I tended ditch for def'ts last summer; recognize upper Toombs' ditch on map. At a point near where Stafford taps it we measured last fall; turned all
44 water in ditch into the box; measured 44 inches; measured Cave ditch, 23 inches. There were from 85 to 90 inches below springs; have lived there about 2 years; turned water into upper Toombs' ditch. I had sediment in places, but mostly clear; ditch cut by inexperienced hands, irregularly. Some person has been to work on it in the last few days; saw it last Saturday. It had been worked on; 1st 20 rods of ditch is larger; has been worked on since we measured. It is a loomy soil; water at 3½ inch grade, running through, would make several inches difference; would wear; noticed water flowing from springs last summer; couldn't be much difference in amount at that time & when we measured.

Miners are at work; water spreads over a flat & evaporates; mining on both sides; tailings sluiced in & pond of water standing; water sinks from pond.

There was more water flowing from springs than would fill Toombs' ditches; was tending ditch last summer, in June, July,
45 & August. There were not over 15 inches; about 5 inches ran through the ditch. It was necessary to have water run through flumes; was very dry last summer. The water turned out at head of ditch might have got down probably 10 inches.

Soil is loose; would sink.

Upper Toombs' ditch overflowed down along from head considerable distance; recognize lower ditch on map; never saw any water in it until after suit was commenced; don't call it a ditch; little dam put there last year, & water turned into Stafford's field. No water flows from there into Toombs' field; ground is plowed up, & no trace of a ditch. There is no sod broke part of the way, (pointed out on map.) I examined it twice particularly.

X:

First went there May 1st, 1867; 1st noticed lower ditch—don't know; did not notice it more than any dry road. There were about 150
46 inches in Magpie in May, 1867; in June, about 400 inches; about same in July. Upper Toombs' ditch was built in spring of 1867; know from fresh dirt; never saw water in lower ditch until last year; never saw ditch used until last year; got to Cave Gulch in May, 1867, & went to work for Hornbuckle in May, 1867; don't think any bed rock cut through in running upper Toombs' ditch; cut through clay

sediment. They have been to work on ditch in sediment, and have sunk it down about 20 inches in plaecs; don't call it rock. There were two companies mining on a bar of Magpie. There are some tailings where they are mining, slum ("gullion") and sediment; water that miners used run back in gulch above Toombs' ditch.

Don't think turning water in Hornbuckle's ditch affected the amount of water at springs; water sinks before it gets to springs; water rises at springs & below. When water run in Hornbuckle ditch it
47 lessens the amount below the springs some.

Re-direct:

The work on ditch is fresh; must have been done about last Thursday. The capacity of upper Toombs' ditch, above where Stafford turned out water, has been enlarged.

X:

See marks of shovel in gap where the ditch has been cut down recently about 7 inches; sediment. I speak of its natural formation.

J. A. MORGAN:

Live at Cave Gulch; recognize ground on plat & ditches thereon. 1st saw Toombs' upper ditch about 2 years ago; was present last summer when ditch was measured by Marshall, Keeler, & others; measured ditch as it goes into Stafford's field; it was full & running over two places; it measured 44 inches; that was as much as the ditch would carry; saw the ditch last about 1st of last week; it has been
48 shoveled out some since Nov. last; am a miner; familiar with water-ditches. The soil where ditch runs is a mixture of sand and loom; some of it would wear away rapidly. Soil at gap more of bed-rock; water would wear away soil rapidly, running at a grade of 3½ inches to rod. Measured Hornbuckle's ditch with a box for that purpose; 23 inches at head and 73 inches below springs; didn't get all the water in measuring-box; there were, perhaps, 85 inches there.

There was sufficient water running down Magpie last summer, at most of time, to fill upper Toombs' ditch. I was absent part of time; have seen lower ditch in Stafford's field; 1st saw it last summer; piece of a ditch; have never seen any trace of ditch crossing road; the ground is plowed up; there is a stop near fence; sod has never been plowed. Toombs' ditch overflowed in several places last summer.

X:

49 Worked on Magpie, off & on, for 2 years last past; saw Cave Gulch ditch last Sunday week; not over 20 inches. Miners at work in Magpie; some tailings & slum evidently went down creek; water was muddy; would make some sediment. Was there during latter portion of last summer.

Toombs had water enough to fill his ditch while I was there. I was absent in June & July. He had water enough to fill ditch in August, 1869.

Travelled road frequently in 1866; never noticed lower ditch. Miners are at work about ¼ of mile above head of Toombs' ditch; 2 companies part of time; water flowed back in Magpie Gulch; some evaporated & sunk.

Re-direct:

The ground between where the miners work & Magpie is light, loomy, tailings, &c., & water would loose probably ¼.

MARSHALL, (one of def'ts:)

50 1st went to Magpie about 15th May, 1866. I recognize map & lower ditch; commenced in May & finished in July, 1866; 2 upper ditches same capacity; carried water out to foot hills; ditch carried all of it; commenced survey of Cave ditch in Oct., 1866. I was one of hunting party; went out from 1st to 6th of Oct., I think; base line was run by Keeler while I was hunting; Mr. McGinnis, Mr. , &c., were in the party; were gone about 3 weeks; didn't commence excavating that fall as was not favorable; getting cold; commenced excavating on ditch 16 May, 1867, as soon as frost was out of ground; ditch cost about $15,000. Had a conversation with def't on or about 14th of April, 1867, about construction of ditch; went to his ranche to settle bill. He asked me if were going to construct ditch; said there were boys had struck good prospects over , & he thought it would be a good enterprise;

51 & he seemed to be exercised about it, & anxious; said it would be a good thing for the country. I think I told him that the men who would work on ditch would have the preference of water; said there were some men about his place who would go to work on ditch. I didn't know that any one had any claim to the water at that time. I relied on what Toombs told me, and didn't know that he, or any one, had any claim to water; never saw lower ditch until after law-suit commenced; never saw any water in it since 1866. It is dilapidated; runs to Diamond City road; have examined the ground at or near fence and can find no trace of ditch; was along two roads in fall of 1866, every few days. 1st saw Toombs' upper ditch latter part of Nov., or 1st Dec., 1866. He was working on it. He was not working there in October, 1866. I lived about ¼ of mile from head of ditch; was there frequently in Oct., & there was nothing to obstruct view of ditch, if it had been there. The ditch has been

52 changed since last fall; saw it last Saturday; think it was shoveled out last week. The water has worn it some larger. It is sandy loam; helped measure ditch Nov. 25, 1869. It was more than full, running over 5 or 6 places; put measuring box at point, about where Stafford taps it; 44 inches; measured Magpie at head of Cave Gulch; 23 inches; measured below springs, 73 inches; some ran away, probably 10 or 15 inches; dry weather don't affect springs much; there were miners using spring water; had a reservoir; hydraulic about 100 inches head; water spread out on flat, over sandy, loose soil, & great deal evaporated & sunk in ground. There was enough water to fill Toombs' ditch, if the miners had not bothered it. There would have been about sixty inches; had nothing to do with water below our ditch; had part of time 30 inches in June; about 25 inches in July & August; used a little to keep flumes wet. If we hadn't

53 turned out water it would not have all run down, as some would sink. Stafford was using water to irrigate with.

X:

About 30 inches turned in ditch, in July & August, 1869. There were about 50 or 60 inches running at head of Toombs' ditch last Friday. Toombs' was digging a long ditch in Nov. 1866; could see the ditch from wood-road; hunting on Deep Creek, about 40 miles above. don't think Toombs had changed the capacity very much. He has changed it in places. The water has worn it considerable. Some slum ("gullion;") ditch would hold 75 inches at some places near head. The general average of the ditch is about 14 inches deep. It might carry at this time about 50 or 60 inches.

Redirect:

There is a large body of tailings about Dunning's field; dams the water.

F. G. HERBERT:

54 Miner since 1863, at Bannack 1st, then St. Louis, then Confederate, then Cave, then Magpie. Recognize map; about correct; measured Cave ditch Nov., 1869—23 & fraction inches in ditch. Measured gulch below springs; about 95 or 100 inches. I measured, at request of Mr. Toombs, some water-sinks before it reaches Toombs' ditch. 1st saw portion of Toombs' ditch in 1867. The ditch has been cleared out since last Nov. Was there a few days ago—last Thursday. There was water enough to fill it. Since ditch has been cleaned, 50 inches would be fair average capacity. There has always been water enough to fill the ditch. 3½ inches to rod fall would cut ditch some. It is heavy fall for ditch. 1st saw lower ditch Nov., 1865; don't call it a ditch; grass growing in it now; Have not examined; ground is plowed; don't think has had water in it for 4 years; would carry about 30 inches. It had about 15 inches the other day.

X:

55 Lower ditch did not run where ground is plowed, in Nov., 1865; think not. Mr. Toombs turned water loose preparatory to measurement; turned it out of reservoirs; takes about ¾ of an hour for water to run down.

Redirect:

Toombs had gone up to turn out water about 2½ hours before we measured. Toombs was not with me when we measured.

D. W. CULBERTSON:

Live at Springtown; lived in 1866 at Magpie; recognize map. I mined in Magpie in foot-hills in 1866, 1869 & 1869; was living in gulch in 1867; lived on Dunning's Ranche in June, 1866; went to work for Marshall. There was a little patch of ground plowed for farming in 1865; saw nobody at work on Toombs' ditch in 1866; 1st saw lower ditch in 1866. Portion of it is 2 furrows; at upper end 18 inches by 1 foot; saw water 1st last year, run to old road; examined be-
56 low road & find no trace of ditch crossing road; lived about ¼ mile from head of Toombs' ditch in 1866. I lived there & passed along frequently. The trail run where we would have to cross the ditch if there had been one in Sept. or Oct., 1866. I mined in Magpie last summer. I took up reservoir & mined. The boys across the gulch mined until Sep., & afterwards bought me out. They dumped their water about 624 f't from gulch, at Dunning's house; ground was soft loam, &c., sandy; water spread all over flat; would loose some; ground was dry; am a miner. In Sep., 1869, the water was failing, I thought. I helped measure water in November, 1869; couldn't measure with the box we had. There was about 80 to 95 inches in gulch. 1st saw Toombs' ditch in 1866, late in fall. There were some pegs driven, when we came back from hunt in November. There was nothing done before we went; saw pins, no digging. We had to
57 cross where the ditch would have been; saw ditch about a week ago. It is a great deal larger than it was in 1867: measured it last fall; 44 inches. It was full & running over. Don't think there ever was a time when it would have carried any more. There never was a

time while I was there that there was not enough water to fill Toombs' ditch.

X:

Don't think we were hunting 3 weeks, quite; was at work at 1st ditch, for Keeler, in 1866; saw Toombs at work after I saw stakes, & after we returned in November, 1866. Work on Cave Gulch ditch was commenced about April 18th, 1867. I worked about 60 days. We run about 6½ hours a day in July, August, & Sept., 1869, & there was more water running down than all the ditches would carry. About 2 weeks ago there were only about 12 or 15 inches of water at head of
58 Hornbuckle's ditch.

Re-direct:

We started hunting in Oct.; finished mining in September, about the last, & started a few days after; must have been in October instead of November. If I said November, I take it back.

JOHN HARRIS:

Resides Clark's Gulch. In '66 in Magpie, ¾ mile from Cañon ferry, across from Dunning's ranch, in what is called Dry Gulch, in '66. There 1st Oct., '66. I left 1st to 6th Oct., & went hunting. On our return base line had been run of Cave ditch; lived about ½ mile from Toombs' upper ditch. Did not see ditch started when went hunting. Nothing to prevent seeing if it had been commenced before Christmas. got back in Jan.; was down there again, & went across where ditch runs, and first saw it then. The ditch had not been commenced
59 when went hunting; didn't see any trace of ditch below road.

X:

Lived across hill, nearly opposite Dunning's; mining across from Dunning's ranche; bought grub at Stafford's; was down frequently; lived across the creek from Dunning's.

BOSWELL:

Live at Cooper's Gulch; was at Magpie last Friday to examine ditches of Toombs; recognize ditches on map; examined upper ditch first; small ditch below, dilapidated, extended 30 or 40 rods, near head about width of shovel; didn't find ditch below road; place along fence where grass has not been broken; examined upper ditch; where it is taken out is large ditch with a strong current; grade become less as I went down ditch; sediment had been shoveled out; have not had a great deal of experience; am judge of capacity of ditch. The upper ditch would discharge about 40 inches at terminus.; ditch is cut
60 where Stafford takes water out.

X:

Examined lower ditch to terminus; went down upper ditch to where Staffords turns water out; would carry about 40 inches without running over; was there on Friday about 10 o'clock.

Re-direct:

I went to find a ditch, if there was any. Hornbuckle taking me didn't make any difference about seeing a ditch if it was there.

HORNBUCKLE re-called:

We were encouraged by Mr. Toombs & everybody else in the neighbor-

hood. There was no question about title when I went there to construct ditch.

X:

I had mules on Toombs' ranche in winter of 1866. In the
61 spring of 1866, I was at Toombs' ranche frequently—in July 1866, and never saw a living soul on it. There was plenty of water in 1866 & 1867.

JOHN TOOMBS, in rebuttal:

Springs weak last summer; more water in wet weather than dry weather; run a furrow across the plowed ground; ditch visable; about 100 yards was filled with tailings over 73 fall, last fall; cleaned out part of ditch last Friday; tailings; have not enlarged ditch; soil is clay, gravel, and black dirt; ditch has not washed but little; has not increased capacity of ditch; don't desire to retract anything I said in regard to Marshall conversation; took a day or two for water to run down from dam to where Herbert measured water. Water don't sink between Cave ditch & springs.

X:

Turned water out of 1st reservoir about ¼ mile above; would
62 take 2 or 3 days to run down; 2 or 3 reservoirs open. Springs discharged last summer about 30 inches.

Re-direct:

Water from springs filled a little in ditch.

ISRAEL CLEM:

Lived in Magpie Gulch since 1868; was there in summer of 1869; 1 mining party on north side of creek, the other about 400 yards above my house. There were about 30 or 35 inches running from springs before miners used it; miners carried water about 200 yards from gulch; water runs back into Magpie; was not materially diminished; was muddy; have seen upper Toombs ditch frequently; 1st in summer of 1867; saw it a few days ago. No change of ditch by washing since 1867.

Ditch was filled up with tailings to the extent of ⅔, probably
63 8 or 10 inches of tailings in the bottom of ditch. The miners' tailings filled it up. I saw ditch few days ago; saw where they had been taking out tailings. No fresh dirt but tailings. Sides of ditch have washed some; washing commenced 4 or 5 rods below head of ditch. Saw lower ditch that crosses-road; saw ditch overflow where tailings were in ditch; large amount of tailings; don't know how long it would take tailings to fill up ditch; ravine connects ditch with ditch in field.

X:

Can trace marks of ditch, which has been plowed up; ravine starts 100 y'ds from fence; ravine starts above road; ditch starts 150 y'ds above road & crosses it; about 30 inches flowing from springs last summer; about same in November; water from mines runs across flat; solid ground, combination of sand, gravel & loom. It was dry last summer. I used water for irrigation; 7 or 8 inches.

64 Re-direct:

I rented ranche and water right.

X:

I am on Toombs' bond for costs.

Re-direct:

I consider Toombs able to pay his debts.

X:

Toombs has a ranche; don't know what it is worth; has some stock.

Re-direct:

(Objections sustained.)

JAMES VANDELBERGER:

Live in Magpie, since May, '69; miner since fall of '66; was present when Herbert measured gulch; turned water out of reservoir; would take two days to run down; commenced to build a ditch in June; carried water out about ½ mile; about 15 rods from creek; didn't loose more than 4 or 5 inches of water by mining; Toombs' ditch not worked at head; could see lower ditch plainly; judge of its "visibleness" by its size.

65 X:

Other miners dumped water from 150 to 200 yards from gulch; ground "loomy;" dry season last year; water spread over the ground; am interested in ditch.

MCCRACKEN:

Cause of ditch overflowing was on ac. of tailings & sediment; saw ditch every other week, once or twice a day; had to clean it out almost every day to keep it from overflowing; ditch would fill up from 10 to 12 inches.

Question. How often did the ditch overflow in summer of 1869, in consequence of tailings and sediment?

(Objected to; sustained; pl'ffs except.)

Ditch visible that crosses road & irrigates Toombs' field. There is a ravine above road; don't think it has ever been dug; think lower ditch would carry water.

X:

66 The ditch once run there, but has been plowed up. It does not run there now. Hornbuckle was not mining; miners filled up ditch with tailings; miners work about ½ mile above; farming for Stafford last year; interested in benefit of water.

ROBINSON:

Saw Toombs' ditch last year; head didn't show wash; pretty level; ditch washed at high ground; general contour of ditch does not show wash; saw lower ditch where it crosses; visible where crosses road.

X:

Ditch crossing road does not connect with other ditch that I know of.

Re-called:

There is high ground, &c. The Stafford & Toombs ditches may intersect at places where I don't know; have always supposed that
67 ditch running into Toombs' field was middle ditch; Stafford had a ditch in May, 1866; water running in it; was looking for a man who was murdered in 1865, & saw ditch of Toombs that runs into his field.

X:

Road doesn't run same place as now; Toombs' garden below the road; can't swear positively whether it was the Stafford ditch or other.

STAFFORD:

Helped make both ditches. (Explained ditches, &c.) The lower ditch is the one that crosses road. Both ditches drop in same ravine. The ditch that crosses road is one made by Sewell; ditch is "visible;" can see ditch from road some distance; saw Toombs' ditch last Tuesday; upper end of ditch has not been enlarged materially; has washed a little below; don't think will carry any more water than when con-
68 structed; tailings settle in ditch; ditch has been cleaned out; tailings ;no fresh dirt; saw it last Monday; ditch did not overflow except where filled with tailings; water run down thick; side ditches of miners carried water around tailings, & don't think waste was so great as it would have been if water had run in gulch.

X:

Water spreads all over ground after used by miners; ditch has caved some; road crosses near divide, & has enlarged ditch; swail carries water about 10 rods.

HENRICK:

Have been familiar with Toombs' ditch since 1866; general capacity of it hasn't been changed; ditch fills up with tailings at bend; water muddy when miners use it.

Cross-ex.:

I was interested in the crop last year.

69 GRIFFITH.

Noticed head of Toombs' ditch; couldn't cut a great deal by wash. Didn't go down far.

Cross-ex.

Ditch would hold more water at head than other places.

The above was the testimony in the case.

The plaintiff then asked the following instructions which were given by the court.

JOHN TOOMBS
vs.
JAMES HORNBUCKLE ET AL. } Claim to water.

First. A valid claim to water can only be made by giving notice to the world of the intention to appropriate the water in the usual manner, by marking out the line of the ditch contemplated, designating the waters intended to be appropriated, or by some other notice to
70 the world, sufficient to indicate the intention to appropriate the same for some useful and beneficial purpose.

Given.

Second. A bare intention to appropriate water is not sufficient to constitute a valid claim.

Given.

Third. Appropriation—A valid appropriation of water can only be made by the construction of ditches or aqueducts, or taking actual

possession of the water claimed in some other manner; and when such works are completed with due diligence, the date of such appropriation relates back for its inception to the date of the claim.

Given.

Fourth. The first appropriator of water is entitled to the amount appropriated by him as against a junior appropriator.

Given.

Fifth instruction refused.

Sixth. This is an action to establish the right of the plaintiff to
71 a certain portion of the waters of Magpie Gulch, and for the recovery of such damages as he may have sustained, if any, by reason of an alleged diversion; & if you find from the evidence that the plaintiff was the first appropriator of certain waters of said gulch and that the defendants wrongfully diverted the same or any part thereof, you will find for the plaintiff the amount of damages sustained by him on account of such diversion.

Given.

Seventh instruction refused.

Eighth. The law makes no distinction as to the rights of appropriators of waters whether for mining, agricultural, or other useful purposes, but the first in time is first in right.

Given.

Ninth. If the jury believe from the evidence that the plaintiff was the first appropriator of a certain number of inches of the common waters of Magpie Gulch, below the springs, he is entitled as
72 against said defendants to a sufficient quantity of the water of said gulch and springs, to fill his ditch to its full original capacity.

Tenth. Plaintiff's appropriation of water is not limited in amount to the quantity his ditch is capable of carrying through its entire length. If you believe from the evidence that it was constructed for irrigating purposes, and used at intermediate points, but the capacity of his ditch from the head to the point whereat the same or a portion thereof was first used, is the true measure of the amount of the appropriation.

Given.

The question is what amount of water will plaintiff's ditch convey to such points as the same may be used for benficial purposes; and if prior to defendants, he is entitled to the amount the same will so carry.

Given.

73 Eleventh. Unless you believe from the evidence that the plaintiff believed that it was the intention of the defendants to appropriate the same waters claimed by him, and that the declarations of said plaintiff induced or caused said defendants to expend money or labor in making their appropriation of said water, which they would not otherwise have done, or that it would be a fraud npon the rights of the defendants to permit plaintiff at this time to assert his right to the water appropriated by him, then defendants can claim no benefits on account of such declarations.

Given.

In considering this question you will take into consideration the circumstances and condition of affairs, and the knowledge and means of knowledge of the parties of the subject-matter, & manqer in which their respective rights would be affected.

Given.

Twelfth. The amount of water plaintiff's ditch will carry from
74 the head to the commencement of use thereof is the measure of its capacity, and if plaintiff's appropriation was prior to that

of defendants, he may sell or give away the waters the same will convey at any point (for useful purposes) between the head and mouth of his ditch.

Given.

13th instruction refused.

14th. The actual construction of a ditch tapping the waters of a stream is a notice to the world of an appropriation of the waters to the extent of the capacity of such ditch, and the owner thereof is not required to notify any subsequent appropriators of his claim to such water.

Given.

In controversies respecting the right to water, between prior, junior, or intermediate appropriators, the junior appropriator must suffer the consequences of a diminution in the water not occasioned by the fault of the prior appropriator.

Given.

75 To the giving of which, and each one thereof, the defendants then and there excepted.

The defendants asked the following instructions:

TOOMBS *vs.* HORNBUCKLE ET AL. } Def's instructions.

1. The jury are instructed that, in order to constitute an appropriation of water, only such acts are necessary, and such indications and evidences of appropriation required as the nature of the case & the face of the country will admit of, and are, under the circumstances, and at the time, practicable—surveys, stakes, and blazing of trees, followed by work and actual labor will in every case, when the work is completed, give title to the water over subsequent claimants.

Given.

2. The title to water conveyed through a ditch constructed in such a manner will, on completion of the work, date back from the

76 beginning of the work.

Given.

The taking up of water for a special limited purpose is only an appropriation of so much water as is necessary for that particular purpose.

Given.

4. If the jury believe from the evidence that, at the time of the appropriation of the water of Magpie Creek in May, 1866, the parties constructing such ditch left as much water flowing below the head of their ditch as had at that time been actually appropriated by the plaintiff, they will find for the defendants.

Refused.

5th. If the jury believe from the evidence that, at the time of the appropriation by defendants of the water in what is called Cave Gulch ditch, the defendants left as much water flowing below the head of their ditch as had been actually appropriated by plaintiff, and as much as the capacity of his ditch would amount to, then they will find a verdict for the defendants.

Refused.

77 6th. If the jury believe from the evidence that, in 1869, there was as much or more water flowing from the springs below defendants' ditch than would fill the plaintiff's ditch, they will find for the defendants.

Given.

7th. When a party stands by and sees a ditch-owner appropriate water of a creek to his own use at great expense, and does not inform him of his claim to the water, he & his vendees are estopped from afterward claiming the water.

8th. When a party stands by and sees a ditch-owner appropriate water of a creek to his own use at great expense, & does not inform him of his claim to the water, he is estopped from afterwards claiming the water.

Given.

9th. Where a party having claim to water encourages another to construct a ditch which would convey away such water, and such ditch is subsequently constructed, he would be estopped from afterwards claiming such water.

Given.

78 10. Where a party appropriates water by the construction of a ditch for sale for mining or other purposes, he has the right at his pleasure to change the place where it was originally used, and may divert and carry the same in another ditch to any other locality for such purpose if intermediate rights have not accrued to other persons.

Given.

11th. If the jury believe from the evidence that the water of Magpie Creek below the ditch of defendants was used and appropriated by miners along the banks of said creek in 1869, as to materially diminish the flow of water to plaintiff's ditch, that the defendants cannot be held responsible for such diminution.

Given.

12th. If the jury believe from the evidence that the plaintiff has sustained damage from the want of a sufficient supply of water, such damage cannot be recovered against the defendants unless they believe from the evidence that such damages were caused by the acts of the
79 defendants.

Given.

13th. If the jury should believe from the evidence that a portion of the damages (if any) were sustained by plaintiff resulting from diversion of the water was caused by persons other than the defendants, they will find for the defendants.

Refused.

14th. If the jury believe from the evidence that any portion of the damages (if any there were) resulting from the diversion of the water was suffered by any person other than the plaintiff, they will find for the defendants.

Refused.

15th. In this case the jury would not be justified from the pleadings and evidence, to render any verdict for damages.

Refused.

16th. Actual appropriation is the test to determine conflicting rights to the use of water, and unless the jury find from the evidence that, by virtue of such actual appropriation, the plaintiff had acquired
80 a prior right to the water diverted by the defendants, then the jury will find for defendants.

Given.

17th. If the jury find from the evidence that the plaintiff voluntarily allowed other parties than the defendants to take the waters of Magpie Gulch & to divert & use the same for mining & irrigating purposes & thereby rendered his own supply insufficient for his own use or necessities, then the defendents cannot be held responsible therefor, & the jury will find for the defendants.

Given.

18. If the jury believe from the evidence that the plaintiff changed the place of his appropriation from its original location, that would not give him the right to enlarge it beyond the capacity of the original ditch, as against any intermediate appropriator.

Given.

81 The cause was then submitted to the jury who returned the following verdict and special findings, to wit:

JOHN TOOMBS
vs.
HORNBUCKLE ET AL.

We, the jury, find for the plaintiff, and assess damages in one dollar.

JACOB SMITH, *Foreman.*

JOHN TOOMBS
vs.
JAMES HORNBUCKLE ET AL.

Special findings submitted by court.

1st. How many inches of water (if any,) is the plaintiff entitled to by prior appropriation & by intermediate rights acquired after the construction of defendants' first ditch, and before the commencement of their second ditch?

70 inches of water.

JACOB SMITH, *Foreman.*

2. How many inches of water flowed down the said creek to plaintiff's ditch during June & July, 1869?

82 60 inches of water.

JACOB SMITH, *Foreman.*

3. How many inches of water flows down Magpie Gulch from the springs, when all the water is taken out above the springs, during wet or dry season, and it is not obstructed by miners?

70 inches of water.

JACOB SMITH, *Foreman.*

Whereupon the defendants gave notice of motion for new trial, which is as follows:

In 3rd judicial district court, Lewis & Clarke County, Montana Territory.

TOOMBS
vs.
HORNBUCKLE ET AL.

And now comes the *plaintiff* and gives notice of motion for new trial in the above-entitled cause upon the following grounds:

1st. Irregularity in the proceedings of the court by which the defendants were prevented from having a fair trial.

2. Misconduct of the jury.

83 3. Insufficiency of the evidence to justify the verdict, & that it is against law.

4. Error in law occurring on the trial and excepted to by defendants.

CHUMASERO & CHADWICK,
Def'ts' Atty's.

And the defendants relies upon the following grounds in support of his motion for new trial:

1st. That the evidence was insufficient to justify the general verdict against the defendants—the evidence not showing any appropriation of 70 inches of water by the plaintiff, or that the defendants had in any way interfered with any water which plaintiff claimed to have appropriated—and that it does not show that the plaintiff ever appropriated any water flowing above the head of defendants' ditch.

That the court erred in giving the plaintiff's instructions.

That the court erred in not giving the defendants' instructions as asked for by him.

That it erred in modifying the same.

84 And for admitting the testimony of plaintiff to which defendant excepted on the trial, and for refusing to permit the introduction of testimony offered by defendants on the defence and to which ruling exceptions were taken on the trial.

And for misconduct of the jury.

And for the reason that the defendants has since the trial discovered evidence material for him and which he could not with reasonable diligence have discovered and produced on the trial.

And that he was surprised by the testimony of Mr. Griffith in relation to the measurement of the ditches of plaintiff and defendant, and which ordinary prudence could not have guarded against.

CHUMASERO & CHADWICK,
Def's' Att'ys.

85 And on the 21st day of April, A. D. 1870, the following decree was duly entered of record, to wit:

Territory of Montana, district court, third judicial district, Lewis & Clarke County.

JOHN TOOMBS, PLAINTIFF,
vs.
JAMES HORNBUCKLE AND SAMUEL MARSHALL, def'ts.

This cause coming on to be heard upon the amended complaint and the answer thereto, and a jury having been regularly empanneled and sworn to try the issues between the said plaintiff and above defendants, and the said jury, after hearing the evidence, argument of counsel, & the instructions of the judge, retired to consider of their verdict in charge of a sworn officer; & after deliberation, on the sixteenth day of April, A. D. 1870, said jury returned into court with a verdict in favor of said plaintiff and against defendants, and assessed his damages

86 in the sum of one dollar; and whereas the jury further found that the plaintiff was entitled, by prior appropriation and intermediate rights, to seventy inches of the waters of Magpie Creek before the commencement of the second ditch of defendants, diverting said waters from Magpie Creek and conveying the same to Cave Gulch.

And whereas, it moreover appears to the court that, said appropriation of seventy inches of water was made by the plaintiff by means of ditches for the irrigation and successful cultivation of a certain ranche or tract of land in the county of Meagher and Territory of Montana, commencing at the mouth of the aforesaid creek known as Magpie, on the east side of the Missouri River, and thence along the bank of said river one-half mile; thence easterly one-half mile; thence southerly one-half mile; thence westerly to the place of beginning so as to embrace one hundred and sixty acres.

It is therefore, upon motion of Messrs. Woolfolk & Toole, attor-
87 neys for plaintiff, adjudged and decreed that the plaintiff is entitled as against the said second or Cave Gulch ditch of defendants, to the free uninter'upted use and enjoyment of seventy inches of the said waters of Magpie Creek according to miners' measurement.

And it is further ordered, adjudged, and decreed that the defendants, their servants, agents, and employees, and all persons acting by, through, or under them, be forever restrained and enjoined from diverting from said Magpie Creek into their said Cave Gulch ditch any more of the waters of said creek than the excess over and above the said seventy inches to which plaintiff is entitled as aforesaid, said quantity to be estimated at the upper ditch of plaintiff, and that said defendants, their agents, servants, and employees, and all persons acting by, through, or under them shall permit a sufficient quantity of water to flow down said creek at the head of said Cave Gulch ditch as will leave in the
88 channel of said creek at the upper ditch of plaintiff, the total amount of seventy inches of water as aforesaid; and that the plaintiff recover of defendants the sum of one dollar, his damages as found by the jury, & that defendants have and recover of plaintiff their costs in this action.

Given under my hand this 21st day of April, A. D. 1870.

G. G. SYMES,
Judge 3 Jud. Dist.

In 3rd judicial dist. court, Lewis & Clarke Co., Montana Territory.

J. TOOMBS
vs.
J. HORNBUCKLE ET AL.

And now comes the defendants, by Chumasero & Chadwick, their attorneys, and move the court for a new trial upon the statement herein and the specifications of errors attached thereto.

CHUMASERO & CHADWICK,
Def'ts' Att'ys.

And afterwards, on the 8th day of July, A. D. 1870, the follow-
89 ing order was made & entered, to wit:

JOHN TOOMBS
vs.
JAMES HORNBUCKLE ET AL.

In this action the statement being this day settled before the court thereupon the cause came on to be heard upon defendants' motion for a new trial; whereupon it is

Ordered, that the said motion be, and the same is hereby, overruled and denied; to which ruling the defendants by their attorneys then and there excepted.

And afterwards, on the 29th July, A. D. 1870, def'ts filed their notice of appeal, which is in the words & figures following, to wit:

In 3rd judicial dist. court, Lewis & Clarke County, Montana Territory.

JOHN TOOMBS
vs.
JAMES HORNBUCKLE & SAM'L MARSHALL.

You will please take notice that the defendants in the above-
90 entitled action hereby appeal to the supreme court of this Territory from the decision of the court overruling the motion for new trial. Also from the judgment and decree therein made and entered in April, 1870, in favor of the plaintiff in said action, and against the defendants, and from the whole thereof.

Dated this 25th day of July, A. D. 1870.
Yours, &c.,
CHUMASERO & CHADWICK,
Att'ys for Defendants.

To the CLERK of said court and WOOLFOLK & TOOLE, *Pl'ffs Att'ys.*

Service of copy admitted July 25th, 1870.
WOOLFOLK & TOOLE,
Pl'ffs Att'ys.

And on the same day, to wit, July 29th, 1870, defendants' undertaking on appeal was duly approved & filed, & is in the words & figures following, to wit:

In 3 judicial dist. court, Lewis & Clarke County, Montana Territory.

JOHN TOOMBS
vs.
JA'S HORNBUCKLE & SAM'L MARSHALL.

91 Whereas the defendants in the above cause have appealed to the supreme court of the Territory from the judgment and decree entered against them in said action in favor of said plaintiff, and the order of said district court overruling defendants' motion for a new trial therein:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, George Bantz & A. W. Kingsbury, do hereby, jointly and severally undertake and promise, on the part of the appellant, that the said appellant, will pay all damages and costs which may be awarded against him on the appeal not exceeding three hundred dollars; to which amount we acknowledge ourselves, jointly and severally, bound.

And whereas said appellant is desirous of staying the execution of said judgment and decree so appealed from, we do further, in consideration thereof, and of the premises, jointly and severally, undertake

92 and promise and do acknowledge ourselves further, jointly and severally, bound in the further sum of fifteen hundred dollars, that if the said judgment and decree appealed from or any part thereof be affirmed, the appellant shall pay all damages and costs which the said plaintiff may sustain by reason of the said appeal, not exceeding said sum of fifteen hundred dollars.

Dated July 25th, 1870.

GEORGE BANTZ. [SEAL.]
A. W. KINGSBURY. [SEAL.]

TERRITORY OF MONTANA,
Lewis & Clarke County, ss:

George Bantz and A. W. Kingsbury, being duly sworn, each for himself, says that he is worth the amounts specified in the said undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

GEORGE BANTZ.
A. W. KINGSBURY.

Subscribed & sworn to before me this 28th day of July, 1870.

W. F. CHADWICK,
Notary Public.

93 TERRITORY OF MONTANA,
Lewis & Clarke County:

I, W. S. Scribner, clerk of the 3rd judicial district in & for said county and Territory, do hereby certify that the foregoing ninety-two pages, numbered from one to ninety-two, inclusive, contain a true and correct transcript of the papers, orders, and proceedings on file and of record in my office in the case of John Toombs against James Hornbuckle et al.

Attest my hand & the seal of said court, this 18th day of December, A. D. 1870.

[SEAL.]

W. S. SCRIBNER, *Clerk.*
By CHA'S G. REYNOLDS, *Deputy Clerk.*

94 In the supreme court of Montana Territory. January term thereof, A. D. 1871.

JOHN TOOMBS, PLAINTIFF AND RESPONDENT,
against
JAMES HORNBUCKLE, SAMUEL MARSHALL, John Doe, & Richard Roe, def'ts & appellants.

Be it remembered that, on the 25th day of December, A. D. 1870, the transcript on the appeal of the above-entitled cause from the judgment rendered therein in the 3rd judicial district court sitting in and for the county of Lewis and Clarke, in said Territory, was duly filed in the office of the clerk of said supreme court, and the said cause entered for hearing on the appeal at the succeeding term of the court to be begun and held on the first Monday in January, A. D. 1871.

95 And afterwards, to wit, on the 11th day of January, A. D. 1871, the said cause came on to be heard in said court on the said appeal, and the same was argued by the counsel for the respective parties, and submitted with briefs, of which, in words and figures, the following are copies, to wit:

Appellants' brief.

In supreme court, Montana Territory.

JOHN TOOMBS
vs.
J. HORNBUCKLE ET AL.

APPELLANTS' POINTS, &C.

This was an action to restrain the diversion of water and for damages. A decree was entered by the court below for plaintiff that he was entitled as against the defendants to 70 inches of the waters of Magpie Creek, and that the defendants be enjoined from diverting from Magpie Creek into their ditch any more of such waters than the excess over 70 inches, which would flow to the ditch of plaintiff, and that they permit a sufficient quantity of water to flow down said
96 creek at the head of their ditch, as would leave in the channel of said creek at the upper ditch of plaintiff the total amount of 70 inches of water.

From this decree the defendants appeal to this court and claim that it was not justified either by the evidence or the special findings, which control the general verdict under our act.

(See Practice Act, section .)

The two ditches concerning which this controversy arose, are about two miles apart.

(See Record, page 25.)

The defendant's ditch is about one mile above the spring alluded to in 3rd special finding.

(See page 33 of record, 35, 36, 37.)

The waters of the creek were used above Toombs' ditch by miners.

McCracken's testimony ..... page 32, record.
Hornbuckle's do. ..... " 33, 34, & 35, "
Keeler's " ..... " 39, "
Smith' " ..... " 44 & 46, "
Morgan " ..... " 49, "
97 Marshall's testimony ..... page' 52, 53, record,
Culbertson' do. ..... " 56, "

As to the diminution of quantity of water by miners. See testimony of—

Keeler ..... page of record 39.
Morgan ..... " " " 49.
Culbertson ..... " " " 56.
Stafford ..... " " " 68.

It will be seen from the above testimony that the water flowing from the springs was diminished in quantity at least one-third, and still it lacked only 10 inches of furnishing all the water the plaintiff, by the findings of the jury, was entitled to. And according to all the testimony in the case, this user of the water materially diminished its quantity below the springs. The special findings are in accord with these established facts, and the rights of the parties should be determined by them. (See the special findings, page 81 of the record.)

These findings show conclusively—

98 1st. That the defendants had not diverted any water from the

plaintiff's ditch, to which he was entitled either by appropriation or otherwise.

2nd. That in any season, either wet or dry, there was at all times flowing from the springs, which are midway between the respective ditches of the plaintiff & defendants and one mile above the plaintiff's ditch, the total amount of 70 inches of water, to which the special findings show the plaintiff to be entitled, when the water from the springs is not obstructed by miners.

3rd. And that even when it was so obstructed that 60 inches still reached plaintiff's ditch.

The evidence shows that miners were using these waters and obstructing its flow during June and July, 1869. But this decree makes defendants responsible for the acts of these miners, and compels
99 them to supply, from water to which they are indisputably entitled and to which the plaintiff has no legal or equitable claim, the alleged deficiencies of plaintiff, growing out of the unauthorized acts of third parties with whom the defendants are in nowise connected, and compels them to permit a sufficient quantity of water to flow past the head of their ditch, to leave in the channel of the creek at the head of plaintiff's ditch, the total amount of 70 inches of water, entirely regardless of any depredations that may be committed by strangers below their point of appropriation.

We submit that this decree overrides every established principle of equity. No man should be made responsible for the acts of another, committed without his knowledge or assent; and his property wrested from him in the name of law to compensate an injury, which he
100 had no instrumentality in causing; yet this is exactly what the injunction decreed in this cause does.

We, therefore, ask that so much at least of the decree, which interferes with the user by defendants of all the waters of Magpie Creek at the head of their ditch, be set aside, and the injunction dissolved.

CHUMASERO & CHADWICK,
Att'ys for Def'ts & Appellants.

And on the same day the plaintiff and respondent, by his attorneys, Mess. E. W. & J. K. Toole, filed his brief, of which, in words and figures, the following is a copy, to wit:

TOOMBS, PL'FF & RESPONDENT,
vs.
HORNBUCKLE ET AL., DEF'S & APPELLANTS.

Points of respondent.

1st. The general verdict of the jury controlls except as to special findings wholly inconsistent with it.

101 2nd. Plaintiffs were first in right as to the seventy inches of water.

3rd. The decree only gives them this amount; requires enough to be turned out by appellants to let 70 inches reach head of plaintiff's ditch. If they do this plaintiffs look to trespassers for any diversion or diminution in the water at any intermediate point.

4th. Plaintiffs being first in time and right, are not required to suffer from drouth or natural causes. Hence finding No. immaterial.

5th. General verdict conclusive as to estoppel. Nothing inconsistent. (See instructions, &c.)

E. W. & J. K. TOOLE,
For Respondent.

And afterwards, to wit, on the 16th day of January, A. D. 1871, the said cause coming on for determination on the appeal, and the
102 errors assigned having been fully argued by counsel, and the court being fully advised as to the law in the case:

On consideration whereof it is considered and adjudged by the court that the judgment and decree herein of the court below be affirmed with costs.

And thereupon the opinion in writing of the court was filed in said cause, of which, in words and figures, the following is a copy, to wit:

In the supreme court of the Territory of Montana, of the January term thereof, A. D. 1871.

JOHN TOOMBS, RESPONDENT,
vs.
JAMES HORNBUCKLE ET AL., APPELLANTS. } Appeal from Lewis & Clarke County.

The plaintiff in this case alleges right of possession and user of
103 about two hundred and fifty inches of the waters of Magpie Creek, by virtue of his appropriation thereof, made in 1865, by means of a ditch then constructed for the purpose of irrigation, and alleges a continuous wrongful diversion of such water by defendants prior to commencement of this action, and threats by defendants to continue such diversion. He prays judgment for damages; that title be established and decreed in him to the extent of his prior appropriation, and that defendants, and those in privity with them, be perpetually enjoined from diverting such waters.

The answer in substance denies plaintiff's appropriation, and also denies that defendants "wrongfully or unlawfully" diverted said water; and sets up an appropriation of the waters of Magpie Creek made by defendants for mining purposes, in May, 1866, and subsequently in October, 1866, by means of ditches then constructed, and that said
104 waters were then unappropriated, and that defendants thereafter remained in full and peaceable possession thereof; and further plead, by way of estoppel, that plaintiff had actual knowledge of defendants' intention to so appropriate said water prior to and during the construction of their ditches, and failed to assert his title to said water or to forbid their construction of the ditches.

The replication specifically denies each allegation of the answer.

The denial of "unlawful and wrongful" diversion, as has been often held, admits the fact of diversion, so that the only issues on the pleadings are upon the priority, the respective appropriations, and upon the facts constituting the estoppel pleaded. The issues were tried by jury, which found a general verdict for the plaintiff, and a special verdict upon questions of fact submitted to them. The court below overruled defendant's motion for a new trial, and rendered judgment for the
105 damages found by the jury, and entered a decree perpetually enjoining the defendants and their privies from so diverting the waters of the creek as to prevent seventy inches of water—being the quantity found by the jury to have been first appropriated by plaintiff—from flowing down to plaintiff's ditch. From the order overruling his motion for a new trial, and from the judgment and decree, the defendant appeals, and assigns as error that the evidence and special findings of the jury do not support the decree, and are in conflict with the general verdict.

The evidence is in some respects conflicting, but whatever our views

might be in any case we do not feel justified by any precedents in setting aside a verdict as contrary to evidence, unless clearly unsupported by evidence, which is not the case here; so that the only question left to consider is whether the special verdict conflicts with the general
106 verdict, and fails to support the decree.

The general verdict finds the issues joined, as to priority of appropriation, and as to the facts set up as an estoppel for the plaintiff. These were the only issues raised by the pleadings.

The first special finding of the jury fixes the amount of plaintiff's appropriation at seventy inches of water, and of this finding appellants do not complain. The second finding is that sixty inches of water flowed down to plaintiff's ditch during June and July, 1869, when the diversion by defendants is alleged.

The third finding is that seventy inches of water "flow down Magpie Gulch from 'the springs' when all the water is taken out above the springs during wet or dry season and it is not obstructed by miners." The "springs" mentioned in the last finding appear from the evi-
107 dence to be situated between the respective ditches of plaintiff and defendants, the latter being some distance above the former, and appellants claim that, under the third finding of the jury, the defendants did not, and as a physical fact could not, divert any water to which plaintiff was found by the jury to be entitled.

Had the question of diversion been properly put in issue, and if the jury had definitely found that, at the time of the alleged diversion, the "springs" below defendants' ditch alone furnished sufficient water to supply the amount found to have been appropriated by plaintiff at the head of his ditch, this would be undoubtedly true, but the last finding is too uncertain and indefinite to overturn the other special findings and the general verdict, and is, besides, immaterial, being upon a fact not in issue. The point urged by appellant that the decree makes him answerable for the acts of third parties with whom he has no
108 privity, in diverting water below the springs, is not well taken, as the decree rendered only requires the defendants to permit so much of the waters in question to pass their ditch as that seventy inches may in its natural flow reach the head of plaintiff's ditch in the bed of the stream at that point, whether from the springs or above them, and this is all that is enjoined on them. They are not held responsible for any acts of others.

The judgment and decree are affirmed.

H. L. WARREN, *Chief Justice.*
HIRAM KNOWLES, *Justice.*

(Endorsed:) Filed Jan'y 16th, 1871.

J. R. ALDEN, *Clerk.*

And afterwards, to wit, on the 21st day of January, A. D. 1871, the said defendants and appellants sued out an appeal from the fore-
109 going decision to the Supreme Court of the United States, and filed herein their writ of error, of which, in words & figures, the following is a copy, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme court in and for the Territory and district of Montana, greeting:

Because, in the records and proceedings, and also in the rendition of a judgment of a plea which is in the said supreme court before you, be-

tween John Toombs, and James Hornbuckle & Samuel Marshall, a manifest error has happened, to the great damage of the said James Hornbuckle and Samuel Marshall, as by their complaint appears; we, being willing that the error if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this
110 behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the said record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done in the premises to correct that error, what of right and according to the laws & customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, and J. R. Alden, clerk of said supreme court of the district & Territory of Montana, this 21st day of January, eighteen hundred & seventy-one.

[SEAL.]

J. R. ALDEN,
Clerk Sup. Court M. T.

111 (Endorsed:) Filed Jan'y 21st, 1871. J. R. Alden, clerk.

And afterwards, to wit, on the 25th day of January, A. D. 1871, the said defendants and appellants filed herein their undertaking on appeal, of which, in words and figures, the following is a copy, to wit:

JOHN TOOMBS
vs.
JAMES HORNBUCKLE AND SAMUEL MARSHALL.

Supreme Court of the United States.

Know all men by these presents that we, James Hornbuckle and Samuel Marshall, as principals, and John Curtin and Jerry G. Smith, as sureties, are held and firmly bound unto John Toombs, in the sum of one thousand dollars, to be paid to said John Toombs, his executors
112 or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, our heirs, &c., jointly and severally, firmly by these presents, sealed with our seals, and dated this 23rd day of January, 1871.

Whereas, the above-named James Hornbuckle and Samuel Marshall, have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit, by the supreme court of the Territory of Montana:

Now, therefore, the condition of this obligation is such, that if the above named James Hornbuckle and Samuel Marshall shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

JAMES HORNBUCKLE. [SEAL.]
SAMUEL MARSHALL. [SEAL.]
113 JOHN CURTIN. [SEAL.]
JERRY G. SMITH. [SEAL.]

Sealed & delivered in presence of—

TERRITORY OF MONTANA,
Lewis & Clarke County, ss:

John Curtin and Jerry G. Smith, being duly sworn, says, each for himself, that he is a resident of said county, and worth the sum named in foregoing bond as the penalty thereof over and above all his debts, liabilities, and exemptions.

JOHN CURTIN.
JERRY G. SMITH.

Subscribed & sworn before me this 23rd day of January, 1871.
[SEAL.] RICHARD LOCKEY,
Notary Public within & for said County.

The amount of security fixed by me at $1,000, and the bond approved, and supersedeas granted January 23rd, 1871.

G. G. SYMES,
Associate Justice of the Supreme Court of Montana Territory.

114 (Endorsed thereon:) Filed January 25, 1871. J. R. Alden, clerk.

And on the same day to wit, the 25th day of January, 1871, the said defendants & appellants filed herein their citation, of which, in words and figures, the following is a copy, to wit:

UNITED STATES OF AMERICA, *ss:*

To JOHN TOOMBS, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, in the District of Columbia, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the clerk of the Supreme Court in and for the district of Montana Territory, wherein John Toombs
115 is defendant, and James Hornbuckle and Samuel Marshall are plaintiffs in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the H. L. Warren, G. G. Symes and Hiram Knowles, chief justice and associate judges of the supreme court of Montana Territory, this 21st day of January, A. D. 1871.

H. L. WARREN,
Chief Justice.
G. G. SYMES,
Associate Judge of Supreme Court, M. T.

(Endorsed thereon as follows, to wit:)
Service of a copy acknowledged this 23 day of January, A. D. 1871.
E. W. & J. K. TOOLE,
Atty's for Toombs.

Filed January 25, 1871. J. R. Alden, clerk sup. court M. T.

116 Supreme court of the Territory and district of Montana.

I, J. R. Alden, clerk of the supreme court of the Territory and district of Montana, do hereby certify that the foregoing one hundred and

fifteen pages, numbered from one to one hundred and fifteen, inclusive, contain a true and correct transcript of the papers, orders, and proceedings on file and of record in my office in the case of John Toombs against James Hornbuckle and Samuel Marshall.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Virginia City, in said district and Territory, this 25th day of September, A. D. 1871.

[SEAL.] J. R. ALDEN, *Clerk.*

117 JOHN TOOMBS
vs.
JAMES HORNBUCKLE AND SAMUEL MARSHALL.

Appeal from sup' court of Montana Territory to the Supreme Court of U. S.

TERRITORY OF MONTANA,
Lewis & Clark County, ss:

James Hornbuckle, one of the above-named defendants and appellees in the above-entitled cause, being first duly sworn, deposeth and saith that the value of the property in controversey in this cause exceeds the sum of one thousand dollars; and further saith not.

JAMES HORNBUCKLE.

Subscribed and sworn to before me this sixth day of November, A. D. 1871.

[SEAL.] W. F. CHADWICK,
Notary Public.

(Indorsed:) John Toombs vs. J. Hornbuckle, et al. Affi'd't value.

(Indorsement on cover:) No. 348. James Hornbuckle and Samuel Marshall, plaintiffs in error, vs. John Toombs, Montana Terr'y sup' court. Filed 21st February, 1872.

Supreme Court of the United States.

OCTOBER TERM, 1873.

No. 139.

JAMES HORNBUCKLE AND SAMUEL MARSHALL, PLAINTIFFS IN ERROR,

vs.

JOHN TOOMBS, DEFENDANT IN ERROR.

In Error to the Supreme Court of the Territory of Montana.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

The action in this case, was brought in the District Court for the Third Judicial District of the Territory of Montana, on the 13th day of April, 1870, by John Toombs against James Hornbuckle and Samuel Marshall, to establish a pretended title to an appropriation of water for the purposes of irrigation; to restrain the diversion of said water, and for damages on account of its alleged diversion from the plaintiff's ditches.

The plaintiff alleges in his bill of complaint, that on, and prior to, the 1st day of May, 1869, he was the owner of a certain ranche or tract of land in the county of Meagher, and Territory of Montana, situated at the mouth of a certain creek or gulch known as Magpie, which land was used for farming purposes; that in order to successfully farm

said land, it is necessary to irrigate the same; that for said purpose, he appropriated about two hundred and fifty inches of the waters of said Magpie creek, and by means of ditches conducted the same upon said land; that said appropriation of water was made in June, 1865; that by the use of said water, he was enabled to raise valuable crops, and that without the use thereof, the said land is wholly valueless; that notwithstanding his said rights in the premises, the defendants, on the 1st day of May, 1869, and continuously thereafter, wrongfully and unlawfully diverted said water from his ditches, whereby he sustained damages in the sum of three thousand dollars; and that the defendants threaten to continue to divert said water, as aforesaid, to his great damage and injury. And his complaint concludes with the following prayers:

"Wherefore, plaintiff prays judgment against the said defendants for the sum of three thousand dollars damages and costs of this action; and that, on final hearing of this cause, the said plaintiff be decreed the title to as much of said waters as aforesaid, as he has appropriated for the purposes aforesaid; and that the defendants, their agents, servants, and employees, and all persons acting by, through, or under them, be forever restrained and enjoined from diverting the said waters so as to prevent the same from flowing through the ditches of plaintiff and upon his said premises, and for such other and further relief as to the honorable court may seem just and proper."—*Record* 1, 2.

The defendants, in their answer and amended answer to the complaint, deny the plaintiff's appropriation of water, and that they wrongfully and unlawfully diverted said water; and they allege an appropriation of the water of Magpie creek, made by them, for mining purposes, in May, 1866, and subsequently in October of the same year, by means of ditches then constructed; that said water was then unappropriated, and that they, thereafter, remained in full and peaceable possession thereof. And they plead, by way of estoppel, that the plaintiff had full knowledge

of their intention to so appropriate the said water, prior to, and during, the construction of their ditches, and that he not only stood by and failed to assert any title to said water, or to forbid their construction of the ditches, but, by his acts and declarations, encouraged the construction of the same.—*Record*, 2, 3, 4.

The replication denies each and all of the allegations in the answer.—*Record*, 4, 5.

The cause was tried by a jury, on testimony introduced by the parties, which appears in the record, (*pp.* 5 *to* 20.) After instructions by the Court, which are, likewise, set out in the record, (*pp.* 20 *to* 24,) the jury, on the 16th day of April, 1870, returned the following verdict and special findings:

Verdict.

"We, the jury, find for the plaintiff, and assess damages in one dollar.

JACOB SMITH, *Foreman.*"

"*Special Findings Submitted by the Court.*

"1st. How many inches of water (if any,) is the plaintiff entitled to by prior appropiation and by intermediate rights acquired after the construction of defendants' first ditch, and before the commencement of their second ditch?

70 inches of water.

JACOB SMITH, *Foreman.*

"2. How many inches of water flowed down the said creek to plaintiff's ditch, during June and July, 1869?

60 inches of water.

JACOB SMITH, *Foreman.*

"3. How many inches of water flow down Magpie gulch from the springs, when all the water is taken out above the springs, during wet or dry season, and it is not obstructed by miners?

70 inches of water.

JACOB SMITH, *Foreman.*"—*Record*, 24.

Whereupon, the defendants, by their attorneys, filed a motion for a new trial, which was overruled by the Court.—*Record*, 24, 25, 26, 27.

And on the 21st day of April, 1870, the Court entered the following judgment and decree in the cause:

"This cause coming on to be heard upon the amended complaint and the answer thereto, and a jury having been regularly empanelled and sworn to try the issues between the said plaintiffs and above defendants, and the said jury, after hearing the evidence, argument of counsel, and the instructions of the judge, retired to consider of their verdict in charge of a sworn officer; and after deliberation, on the sixteenth day of April, A. D. 1870, said jury returned into court with a verdict in favor of said plaintiff and against defendants, and assessed his damages in the sum of one dollar; and whereas the jury further found that the plaintiff was entitled by prior appropriation and intermediate rights, to seventy inches of the waters of Magpie creek before the commencement of the second ditch of defendants, diverting said waters from Magpie creek and conveying the same to Cave gulch.

"And whereas, it moreover appears to the court that, said appropriation of seventy inches of water was made by the plaintiff by means of ditches for the irrigation and successful cultivation of a certain ranche or tract of land in the county of Meagher, and Territory of Montana, commencing at the mouth of the aforesaid creek known as Magpie, on the east side of the Missouri river, and thence along the bank of said river one half mile; thence easterly one half mile; thence southerly one half mile; thence westerly to the place of beginning, so as to embrace one hundred and sixty acres.

"It is, therefore, upon motion of Messrs. Woolfolk & Toole, attorneys for plaintiff, adjudged and decreed that plaintiff is entitled as against the said second or Cave gulch ditch of defendants, to the free, uninterrupted use and enjoyment of seventy inches of the said waters of Magpie creek, according to miners' measurement.

"And it is further ordered, adjudged, and decreed that the defendants, their servants, agents, and employees, and all persons acting by, through, or under them, be forever restrained and enjoined from diverting from said Magpie

creek into their said Cave gulch ditch, any more of the waters of said creek than the excess over and above the said seventy inches to which plaintiff is entitled as aforesaid, said quantity to be estimated at the upper ditch of plaintiff, and that said defendants, their agents, servants, and employees, and all persons acting by, through, or under them, shall permit a sufficient quantity of water to flow down said creek at the head of said Cave gulch ditch as will leave in the channel of said creek, at the upper ditch of plaintiff, the total amount of seventy inches of water as aforesaid; and that the plaintiff recover of defendants the sum of one dollar, his damages as found by the jury, and that defendants have and recover of plaintiff their costs in this action.

"Given under my hand, this 21st day of April, A. D. 1870.

"G. G. SYMES,
"*Judge Third Jud. Dist.*"—
Record, 25, 26.

From the said judgment and decree of the District Court, an appeal was taken by the defendants, on the 29th day of July, 1870, to the Supreme Court of the Territory, where the judgment and decree below were affirmed, January 16, 1871.—*Record*, 27, 28, 31, 32.

On the 21st day of January, 1871, as appears in the record, (*p.* 32,) "the said defendants and appellants sued out an appeal from the said decision of the Supreme Court of the Territory of Montana, to the Supreme Court of the United States, and filed herein their writ of error."

"And afterwards, to wit, on the 25th day of January, A. D. 1871, the said defendants and appellants filed herein their undertaking on appeal."—*Record*, 33.

"The amount of security fixed by me at $1,000, and the bond approved, and supersedeas granted, January 23, 1871.

"G. G. SYMES,
"*Associate Justice Supreme Court,*
Montana Territory."—
Record, 34.

And, thus, the cause is brought to this Court, for review.

ASSIGNMENT OF ERRORS.

1. This case was tried in the Court below, in pursuance of an act of the Legislative Assembly of Montana Territory, passed December 23, 1867; legal and equitable claims were blended together, and the cause was tried partly as an action at law, and partly as a proceeding in chancery.

2. The chief subject-matter of this suit is of chancery jurisdiction, requiring equitable, as distinguished from legal, relief. It was tried by a jury, as a case at common law, and the judgment and decree were pronounced by the Judge, as mere conclusions of law upon the facts found by the jury, and not as the result of his own judgment, upon evidence submitted to him, and contained in the record.

ARGUMENT.

I.

By the 6th section of the act of Congress, entitled "An Act to provide a Temporary Government for the Territory of Montana," approved May 26, 1864, (13 *Statutes at Large*, 85,) it is enacted, "that the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States, and the provisions of this act." The 9th section of the act provides, "that the judicial power of said Territory shall be vested in a Supreme Court, District Courts, Probate Courts, and in Justices of the Peace," and that "the said Supreme and District Courts, respectively, shall possess chancery as well as common-law jurisdiction."

An act of the Legislative Assembly of the Territory of Montana, entitled "An Act to Regulate Proceedings in Civil Cases, in the Courts of Justice of Montana Territory," passed December 23, 1867, provides as follows:

"SECTION 1. There shall be in this Territory, but one form of civil action for the enforcement or protection of

Drift in cases from Montana Courts

private rights, and the redress or prevention of private wrongs.

"SEC. 2. In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant."

"SEC. 38. The only pleadings on the part of the plaintiff, shall be the complaint, demurrer, or replication to the defendant's answer; and the only pleadings on the part of the defendant, shall be a demurrer to the complaint, or a demurrer to the replication, or an answer to the complaint." * * *

"SEC. 155. An issue of fact shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as provided in this act."

This cause was tried in pursuance of the foregoing provisions of the said act of the Legislative Assembly of the Territory of Montana, except that a jury trial was not waived, and that a reference was not ordered, as provided in section 155 of the act. The proceedings are, therefore, wholly erroneous, in that they entirely ignore the distinction between the chancery and common-law jurisdiction conferred by Congress, upon the Territorial Courts, by the organic act. In the case of Dumphy *vs.* Kleinsmith, (11 *Wallace*, 610,) which was brought here from the Supreme Court of Montana, this Court, in passing upon this legislation, and the organic law of the Territory, said:

"From the provisions of the organic law, which have been referred to in the argument, it is apparent that the Territorial Legislature has no power to pass any law in contravention of the Constitution of the United States, or which shall deprive the Supreme and District Courts of the Territory of chancery, as well as common-law jurisdiction."

It distinctly appears by the record, that in this case, legal and equitable claims were blended together, and that the cause was tried in the Court below, partly as an action at law, and partly as a proceeding in chancery. This was clearly an error, as this Court has repeatedly decided. The act of Congress organizing the Territory of Montana, in

conferring jurisdiction upon the Supreme and District Courts of the Territory, makes a distinction between suits at common law, and in equity, to the same effect as is made by the laws of the United States in clothing the Federal Courts with jurisdiction. In Thompson *vs.* Railroad Companies (6 *Wallace*, 137,) this Court, in construing these laws of the United States, expressly held, among other things, that legal and equitable claims cannot be "*blended together in one suit*," as was done in the case now under consideration. The language of the Court is as follows:

"The Constitution of the United States and the acts of Congress recognize and establish the distinction between law and equity. The remedies in the Courts of the United States are, at common law, or in equity, not according to the practice of State Courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles. 'And although the forms of proceedings and practice in the State Courts shall have been adopted in the Circuit Courts of the United States, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit.'"

And see Robinson *vs.* Campbell, 3 *Wheaton*, 212; Noonan *vs.* Lee, 2 *Black*, 509; Bennett *vs.* Butterworth, 11 *Howard*, 674; Payne *vs.* Hook, 7 *Wallace*, 430.

If the principles decided by this Court in the cases cited, are to prevail, the judgment and decree below must be reversed in this case.

II.

It is manifest that the chief subject-matter of this suit is of equitable jurisdiction. The principal relief prayed for by the complainant, and decreed by the Court—the injunction perpetually restraining the defendants—is relief that could be properly obtained only through the instrumentality of a Court of Chancery. It was, therefore, error

to try the case by a jury, in the manner in which it was tried, and for the Judge to pronounce the decree, as he did, as a mere conclusion of law upon the facts found by the jury, and not as the result of his own judgment, upon evidence submitted to him, and contained in the record. As held by this Court, in Dumphy *vs.* Kleinsmith, (11 *Wallace*, 615,) the Judge or Chancellor may refer questions of fact to a jury by a feigned issue, but "he is still to be satisfied in his own conscience, that the finding is correct, and the decree must be made as the result of his own judgment, aided, it is true, by the finding of the jury;" for "he is responsible for the decree."

There is no order in the record directing a feigned issue in this case, and the decree does not profess to be based upon evidence submitted to the Court, and contained in the record, but is founded on the facts found by the jury. The case, therefore, of Dumphy *vs.* Kleinsmith, *supra*, is manifestly decisive of this case.

The proceedings in the Court below, it is submitted, are clearly erroneous, and the judgment and decree should be reversed.

ROBERT LEECH,
For Plaintiffs in Error.

IN THE

Supreme Court of the United States.

No. 139.—October Term, 1873.

Jas. Hornbuckle & Samuel Marshall, Plaintiffs in Error, vs. John Toombs.	Error to the Supreme Court of the Territory of Montana.

Brief of Counsel for Defendant in Error.

This is a proceeding by Toombs, the defendant in error, to restrain Hornbuckle and Marshall from diverting the waters of Magpie creek or gulch from his farm to their mining operations, and also to recover damages. Hornbuckle and Marshall answered (p. 3) denying that they had wrongfully diverted the waters of said creek from him.

The ditches of the parties were about two miles apart. Hornbuckle and Marshall had two ditches—one dug prior to, and the other subsequent to, the digging of Toombs' ditch. The diversion complained of was effected by the second ditch, which diverted the water into another channel, called Cave gulch, after using it. A mile below Hornbuckle and Marshall's ditches there were some springs, which also flowed into Toombs' ditch, the water of which was also used at times by other miners, but was not diverted from Magpie creek and Toombs' ditch,

though their tailings or washings sometimes obstructed its flow in his ditch.

The testimony is conflicting as to the capacity of Toombs' ditch, and whether there was any diversion of water from it by the ditches of Hornbuckle and Marshall. It was submitted to the jury, with copious instructions, given at the request of both parties, (pp. 20, 21, 22, 23, and 24,) and the jury (p. 24) returned the following general verdict and special findings:

"We, the jury, find for the plaintiff, and assess damages at one dollar. JACOB SMITH, Foreman.

"*Special Findings submitted by Court.*

"1st. How many inches of water (if any) is the plaintiff entitled to by prior appropriation and by intermediate rights acquired after the construction of defendants' first ditch, and before the commencement of their second ditch?

"Seventy inches of water. JACOB SMITH, Foreman.

"2d. How many inches of water flowed down the said creek to plaintiff's ditch during June and July, 1869?

"Sixty inches of water. JACOB SMITH, Foreman.

"3d. How many inches of water flows down Magpie gulch from the springs when all the water is taken out above the springs, during hot or dry season, and it is not obstructed by miners?

"Seventy inches of water. JACOB SMITH, Foreman."

And the court gave judgment for damages on the verdict, and by decree confirmed the first finding, and on that and other facts found by itself (p. 25) enjoined the plaintiffs in error from diverting more of the water of said creek from the ditch of said Toombs than would leave him the seventy inches, to which he was found to be entitled.

The first error assigned is, that in the petition "legal and equitable claims were blended together, and the cause was tried, partly as an action at law and partly as a proceeding in chancery.

The first answer to this is, that the objection comes too late. For the claim made on account of loss sustained, and for which the defendant in error was adjudged to pay only nominal damages, plaintiff had an adequate remedy at law; and whilst in the jurisprudence of the United States this question is regarded as jurisdictional, that is not the rule in the state courts, as to courts of general jurisdiction, with which the territorial courts are classed. In such courts the rule is, that the defence of "remedy at law" must be taken by answer or demurrer where the same court had jurisdiction of the subject-matter of the suit in another form, and the failure so to object waived the form.

Underhill vs. Van Courtlandt, 2 J. Ch., 369.

By answering in chief instead of demurring, the defendants submitted the cause to the cognizance of this court (equity), and they came too late at the hearing on the merits to raise the objection that plaintiff's remedy is at law. It would be an abuse of justice, if the defendants were permitted to protract a litigation to this extent, and with the expense that has attended this suit, and then, at the final hearing, interpose this preliminary objection.

2 Caine's Cas. in Error, p. 40, Ludlow vs. Simond.

The respondent comes too late with an objection to the jurisdiction of the court, he having answered and contested on the merits, the subject-matter of the bill being within the jurisdiction of the court. This appears to be a reasonable rule * * * to save expenses. * * Where a party objects to the jurisdiction of the court, he ought to do it at the earliest opportunity.

"Where the common law (said Baron Gilbert) would give the same relief as a court of equity—there, if the defendants will deny the deed and demur to the relief, the demurrer will be allowed; but, if the defendants will

not demur, the court will decree for the plaintiff, on the hearing, after the deed is properly proved, *because the defendant admitted the jurisdiction by answering and putting in issue and not demurring.*"

4 J. Ch., 290.

If a defendant (in chancery) intends to object to the jurisdiction of the court, he should demur to the relief; * * he comes too late with his objection at the hearing, after he has by his answer put himself upon the merits.

2 Paige, 509, Grondin vs. Leroy et al.

This was a bill of injunction to stay a suit at law on a draft. The defendant answered on the merits, not insisting in his answer that the plaintiff had a remedy at law. Held, that he could not set up that plea on the hearing.

4 Cowen, 727, Hawley vs. Cramer.

The defence that there is a perfect remedy at law is not set up in the answer, nor was it objected by demurrer.

It cannot be raised on the hearing, unless the court is wholly incompetent to grant the relief asked in any form of proceeding.

4 Paige, 81, Leroy vs. Pratt.

The objection is urged that plaintiff had a perfect defence at law. The short answer to this objection is, the defendants have not raised any such objection by their answer, and they are too late in making it at the hearing.

2 Dev. & Bat. Eq., 300, Burroughs vs. McNeil.

When the court has no power over the subject, when the power to pass on it is by the Constitution and laws reserved to a different tribunal, there is a want of jurisdiction, and if this forbidden power is used, the action of the court is a nullity in law; but here the objection is, that the court ought not to act in the proposed way.

Certainly, it is a general rule that where plaintiff has an effectual and complete remedy at law, he shall not invoke the aid of equity.

But there is also a general rule that an objection to the exercise of jurisdiction should be taken in due order and apt time or it will be deemed waived.

In this case the objection of remedy at law was not taken by the pleadings, but defendant expressly submitted to the jurisdiction of the court by praying of it to decide on the question of his liability.

1 How. Miss. R., 561, Cable vs. Martin.

Complete remedy at law is to be objected by demurrer or answer, otherwise it will not be heard.

1 Smedes & Marsh Ch., 550, Davis vs. Roberts.

The point was made that the probate court was the proper tribunal, but the court said no notice of such a defence was given by demurrer or answer, and overruled it.

1 Clarke, 75, Holmes vs. Doll.

The defendant answered that "he hoped to have the same benefit and advantage of excepting to the bill at the hearing for want of equity therein, and for want of proper parties, and for want of jurisdiction, as if he had demurred for those or other causes." At the hearing he attempted to insist on remedy at law by virtue of the above generalty, and failed.

1 Freemons Ch., 392, Osgood vs. Brown.

If the defendants had demurred to the bill or inserted in their answer there was a remedy at law, I should incline to dismiss it for that cause. They did neither, and cannot now raise the objection.

1 Bailey Eq., 187, Miller vs. Furse.

Chancellor Harper had ruled on a former occasion that the objection remedy at law was good at any stage of the cause, but in Miller vs. Furse *he admitted his error broadly*, and decided that such an objection, if not relied on specifically in the pleading, was not to be heard, unless the court was incompetent to try the cause in any form.

The rule is not always confined to courts of equity. In Strother vs. Lucas, 6 P., 769, the plaintiff's title was equitable, and no ejectment would lie on it in the federal court, but the case had been tried on the merits, and the court decided it on the merits, disregarding the question of form.

27 Geo., 353, Many vs. Goodwin.

When a defendant has litigated a case for years on its merits, and then moves to dismiss, just as it is about to be submitted, final determination on the ground of remedy at law, his motion will be overruled. If the fact be so, and he neither took advantage of it by plea or demurrer, he must be adjudged to have waived that objection; a different practice would involve delay and expense oppressive in the extreme.

(See further:)

3 Bibb, 384, Fowler vs. Halbert.

1 Barber Ch., 432, Supervisors, &c., vs. Utica Manfac. Co.

The court did not consider if the matter of the bill was equitable or not, as the answer made no such point, but decided the whole case.

7 Mich., 139, Reed vs. Wessell.

3 Abbott Pr., 119, Viburt vs. Frost, shows that the same practice obtains under the code. The defence of remedy at law is to be promptly set up or it is waived.

6 Abbott Pr. R. R., 6; 4 Paige, 400, Bank Utica vs. City of Utica.

15 How., 419, Wylie vs. Cox.

The general principle here contended for is recognized by this court in the decision of this court cited and relied on by plaintiffs in error.

Thompson vs. R. R. Companies, 6 Wall., p. 137.

"*Usually*," says the court, "where a case is not cognizable in a court of equity, the objection is interposed in the first instance; but if a plain defect of jurisdiction appears at the hearing, a court of equity will not make a decree."

Second. But if the *form* of action itself creates a defect of jurisdiction, although the court has jurisdiction over the subject-matter, so that the appellate court could not affirm the decree, this is no reason why it should not affirm that part of the decree upon what the counsel for plaintiff in error speaks of as its "chief subject-matter," and which is in fact its only subject-matter, and is of chancery jurisdiction.

The case of Thompson vs. The R. R. Cos. came up from a circuit court of the United States, and was one, the court say, (p. 137,) where "an action at law, which sought solely to recover damages for a breach of contract, was transmuted into a suit in equity, and the defendant deprived of the constitutional privilege of a trial by jury," &c. Here the claim for damages is not the sole object of this suit, but is an unimportant part of it, and enters only nominally into the decree complained of.

II. The second error assigned is, that whilst "the chief subject-matter of this suit is of chancery jurisdiction, it was tried by a jury as a case at common law, and the judgment and decree were pronounced by the judge as mere conclusions of law upon the facts found by the jury, and not as the result of his own judgment upon evidence submitted to him and contained in the record." This statement is inconsistent with the statement made by the counsel in his first assignment of error. In that

he alleges that the cause was tried *partly* as an action at law, and *partly* as a proceeding in chancery. Here he says the suit was tried as a case at common law, and the decree pronounced as a mere conclusion of law upon the facts proved by the jury; and this last statement is not sustained by the record as to the material part of the case, viz: that which relates to the injunction, the decree for which alone the defendant in error seeks to maintain.

With respect to the case for damages, it is true that the court adjudges "that the plaintiff recover his damages as found by the jury." But with respect to the injunction, a special question was submitted by the court to the jury to get the aid of the jury in forming its opinion. This is the first special interrogatory, copied above, which asks them, in substance, to enquire how much of the water of Magpie creek was diverted by the second ditch of the plaintiffs in error from the farm of the defendant in error, and they found it to be seventy inches. The decree of the court, after reciting this fact, does not, as it does with respect to the damages, proceed to pronounce its decree as a mere conclusion of law upon the finding, but says: "And whereas it *moreover* appears to this court that such appropriation of water was made by the plaintiff by means of ditches," &c. This, in effect, declares that the fact so found by the jury not only appears to the court, but a further material fact, not found by the jury, also appears, or is found by the court, and, "therefore, it is adjudged and decreed that plaintiff is entitled, as against said second or Cave ditch, to the free and uninterrupted use and enjoyment of seventy inches of the said waters of Magpie creek, according to miners' measurement; and it is further ordered and adjudged that the defendants, &c., be forever restrained and enjoined," &c. The refusal of the court to grant a new trial also shows that the verdict accorded with its own judgment on the point in question, because the special ground on which that motion was made was that the evi-

dence did not show "any appropriation of seventy inches of water by the plaintiff, or that defendants had interfered," &c.—(p. 25.)

In the case of Dunphy vs. Kleinschmidt, 11 Wall., 610, the recital of the findings of the jury is followed by the words, "it is, therefore, ordered, adjudged," &c., among other things, that the plaintiff recover of Dunphy some $35,000, which he was adjudged to pay merely because he was a party to an assignment found to be fraudulent, without any account having been made or ordered, or it otherwise appearing that he had the money from the assignment with which to pay this amount. It was not, therefore, merely because the court had not conformed to the strict rules of chancery practice that its judgment was set aside, but because it had done substantial injustice by its decree.

In this case it is not alleged that injustice has been done, and the rules of equity practice have been substantially complied with. For this it was not necessary that the single fact found by the jury, which enters into the decree for the injunction, should have been tried by a jury in another forum. It was competent for the court to associate a jury with it for the determination of this issue. This is the practice in some of the states, where the distinction between law and equity was preserved, as in Georgia.—(McGowan vs. Jones, Charl. R. M., 184.) In Missouri formerly, (Revised Statutes of 1835, p. 511,) which required all issues of fact to be tried by a jury. In Ohio, where the court may find the facts for itself, send an issue to a jury on its own side or on the law side of the court, or refer the matter to a master.—(Goddard vs. Leech, Wright, 476.) Nor can any good reason be given why an issue of fact may not be as well tried in aid of a court of equity, by a jury empaneled by the court, and hearing the testimony which is embodied in the record, in the presence of the court, and guided by its instructions, as by a jury empaneled in another forum.

The counsel for plaintiff in error does not attempt this, but quotes the Montana Practice Act; says this cause was tried in pursuance of that act, which ignores the distinction between chancery and common law, and, "therefore," concludes that "the proceedings are wholly erroneous." This by no means follows. The practice acts of New York and a great many of the states abolish the distinction between chancery and common law actions in the forms of procedure, *without depriving the court of either jurisdiction.* This is the test laid down by this court in Dunphy vs. Kleinschmidt. Nor did the court say or imply in that case that the act of Montana, which is copied from the New York code, has this effect, or declare the proceedings erroneous because in accordance with it. The error was that the court below had based its decree wholly upon the verdict, whereas the petition being wholly a bill in chancery, seeking equitable relief, although it was competent for the judge to refer the facts to a jury, "he is still to be satisfied in his own conscience that the finding is correct, and the decree must be made as the result of his own judgment, aided, it is true, by the finding of the jury." This, we have shown, is the effect of the record in this case, and, whilst the proceedings are, like everything else among frontiersmen, inartificial, the essential rules have been regarded, and this is all this court requires. In none of the cases cited by the adverse counsel has there been a reversal for merely formal defects; and the principle laid down in the oft-quoted passage from the decision in Bennett vs. Bitterworth, that "although the forms of proceeding and practice in the state courts shall have been adopted in the circuit courts of the United States, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit," has never been so applied. In that case the judgment was reversed, not because of any confounding of

law and equity, but because there was neither law nor equity in the proceedings. The verdict was not responsive to the issues, and the judgment did not follow the verdict.

M. BLAIR.
F. A. DICK.

NOVEMBER, 1873.